DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-1053
Title: Brian Coleman, Superintendent, State Correctional Institution at Fayette, et al., Petitioners
v.
Lorenzo Johnson
Docketed: February 27, 2012
Linked with 11A729
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (08-2477)
Decision Date: October 4, 2011
Rehearing Denied: November 8, 2011

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jan 30 2012	Application (11A729) to extend the time to file a petition for a writ of certiorari from February 6, 2012 to February 20, 2012, submitted to Justice Alito.
Feb 1 2012	Application (11A729) granted by Justice Alito extending the time to file until February 20, 2012.
Feb 21 2012	Petition for a writ of certiorari filed. (Response due March 26, 2012)
Feb 21 2012	Appendix of Brian Coleman, Superintendent, State Correctional Institution at Fayette, et al. filed.
Mar 27 2012	Brief of respondent Lorenzo Johnson in opposition filed.
Mar 27 2012	Motion for leave to proceed in forma pauperis filed by respondent.
Apr 11 2012	DISTRIBUTED for Conference of April 27, 2012.
Apr 30 2012	DISTRIBUTED for Conference of May 10, 2012.
May 14 2012	DISTRIBUTED for Conference of May 17, 2012.
May 14 2012	Record Requested.
May 15 2012	United States Court of Appeals for the Third Circuit and U.S. District Court for the Middle District of Pennsylvania records available on PACER.
May 21 2012	DISTRIBUTED for Conference of May 24, 2012.
May 29 2012	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
May 29 2012	Judgment REVERSED and case REMANDED. Opinion per curiam. (Detached Opinion)
Jun 21 2012	Petition for Rehearing filed.
Jun 28 2012	DISTRIBUTED.
Jul 23 2012	Rehearing DENIED.
Jul 23 2012	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

11-1053

FILED
FEB 21 2012
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No. 00-0000

IN THE SUPREME COURT OF THE UNITED STATES

NEAL MECHLING, SUPERINTENDANT STATE CORRECTIONAL INSTITUTION AT FAYETTE, PENNSYLVANIA; COMMONWEALTH OF PENNSYLVANIA
Petitioners

v.

LORENZO JOHNSON
Respondent

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Whether the Court of Appeals' grant of habeas relief based on a finding that the Pennsylvania courts misapplied Pennsylvania law should be reversed given that it conflicts with this Court's holdings that it is not the province of a federal habeas court to examine state court application of state law and that only noncompliance with clearly established federal law will render a state's criminal judgment susceptible to collateral attack in federal court?

2. Whether the Court of Appeals' refusal to credit factual inferences favorable to the prosecution in connection with its *Jackson* analysis due to its subjective view that those inferences do not "more likely than not flow from" the trial evidence should be reversed given that it conflicts with this Court's holdings that a federal habeas court conducting a *Jackson* review must view the evidence in the light most favorable to the prosecution, presume that the jury resolved any conflicting factual inferences in favor of the prosecution, and defer to that resolution?

3. Whether the Court of Appeals' determination, which patently relies upon its own subjective conclusions regarding witness credibility and the proper weight to be accorded the record evidence, should be reversed given that it contravenes this Court's repeated admonitions that a federal habeas court conducting a *Jackson* review is strictly forbidden from substituting its judgment for that of the jury on weight and credibility issues?

4. Whether the Court of Appeals' determination, which relies upon a definition of accomplice liability

that conflicts with Pennsylvania law, should be reversed given this Court's holdings that a federal habeas court engaged in a *Jackson* analysis must apply the substantive elements of the criminal offense as defined by state law?

5. Whether the Court of Appeals' *de facto* finding that the state courts' conviction was based on an unreasonable determination of the facts in light of the evidence presented should be reversed given that it fails to acknowledge or address the presumption of correctness that must be afforded the factual inferences drawn by the state courts pursuant to 28 U.S.C. § 2254(e)(1) and therefore conflicts with this Court's holdings that the presumption of correctness afforded state court factual findings cannot be overridden absent clear and convincing contrary evidence?

PARTIES TO THE PROCEEDING

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B. The Court of Appeals' refusal to credit factual inferences favorable to the prosecution in connection with its *Jackson* analysis due to its subjective view that those inferences do not "more likely than not flow from" the trial evidence directly conflicts with this Court's holdings that a federal habeas court conducting a *Jackson* review must view the evidence in the light most favorable to the prosecution, presume that the jury resolved

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OPINIONS BELOW

The opinion of the panel majority of the Court of Appeals reversing the District Court and determining that a writ of habeas corpus should issue on evidentiary insufficiency grounds is unpublished and is reprinted at Pet. App. 1a. The opinion of the panel minority of the Court of Appeals dissenting from the panel majority's determination is unpublished and is reprinted at Pet. App. 1b. The order of the Court of Appeals directing the District Court to issue the writ is unpublished and is reprinted at Pet. App. 1c. The opinion and order of the District Court denying habeas corpus relief on the grounds that the state courts' application of Article XIV of the Constitution as construed by *Jackson v. Virginia*, 443 U.S. 307 (1979) was objectively reasonable is published at *Johnson v. Mechling et al.*, 541 F.Supp.2d 651 (M.D. Pa. 2008) and is reprinted at Pet. App. 1d and Pet. App. 1e, respectively. The opinion of the Pennsylvania Superior Court affirming Lorenzo Johnson's judgment of sentence is unpublished and is reprinted at Pet. App. 1f. The opinion of the Court of Common Pleas of Dauphin County, Pennsylvania denying post-trial motions and finding Lorenzo Johnson's convictions to be supported by sufficient evidence is unpublished and is reprinted at Pet. App. 1g.

STATEMENT OF JURISDICTION

On October 4, 2011, the Court of Appeals entered an order reversing the District Court's order denying the petition for writ of habeas corpus. On November

8, 2011, the Court of Appeals entered an order denying a request by Appellants for *en banc* and panel rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.C.A. Const. Amend. XIV Sect. 1 (emphasis added).

STATEMENT OF THE CASE

During the early hours of December 15, 1995, Taraja Williams was shot and killed in an alley off Market Street in Harrisburg, Pennsylvania. Twenty-seven months later, Lorenzo Johnson ("Johnson") and codefendant Corey Walker ("Walker") were tried for that murder by a jury in the Dauphin County Court of Common Pleas ("the state trial court"). Following three days of testimony, Johnson was convicted of first-degree murder as an accomplice and of criminal conspiracy to commit murder, for which he received a mandatory sentence of life imprisonment. Walker was

also convicted of first-degree murder (as the principal) and of criminal conspiracy to commit murder, for which he received life imprisonment.

The evidence of Johnson's guilt presented to the jury included the following.

Victoria Doubs ("Doubs") testified that Johnson and Walker were "close friends" that "ran the streets together" and were seen together "most of the time." According to Doubs, she was with Johnson and Walker on the morning of December 14, 1995. In fact, they woke up together on the morning before the murder in the same residence and went to the Kentucky Fried Chicken restaurant on Market Street.

At that time, Taraja Williams ("the victim") approached and Walker indicated to Johnson and Doubs that he needed to go and yell at the victim about a debt the victim owed. Following an encounter between the two men, the victim yelled that Walker would get his money when the victim felt like it, after which a fight erupted in front of the restaurant. The victim beat Walker with a broomstick. The physical altercation between Walker and the victim occurred because *the victim owed money to Johnson, Walker, and Doubs* and the victim refused to immediately pay them. Specifically, Doubs testified that Walker and the victim "were talking about the money that Taraja [the victim] had owed *us*" and that Walker asked the victim "what's up with the money and why is it taking you so long to give *us* the money?"

Many people observed the victim beat Walker with the broomstick and laughed at Walker, making him furious. Doubs testified that Walker was angry that

he had been beaten by "a crackhead" and thereafter repeatedly stated that he was going to kill "the crackhead," meaning Taraja Williams. *Johnson was aware of his friend's humiliation and heard Walker state repeatedly during the 24 hours prior to the murder that he was going to kill the victim in retaliation.* At the conclusion of the morning altercation between Walker and the victim, Walker, Johnson, and Doubs left the scene together.

Carla Brown ("Brown") testified that she was in the Midnight Special Bar at 14th and Market Streets in Harrisburg during the late evening of December 14, 1995 into the early morning of December 15, 1995. She observed that Johnson, Walker and the victim were in the bar together at that time and that Walker was arguing with the victim. Brown also testified that *she saw all three men arguing*, after which the bouncer told the three men that they had to leave the bar. This testimony was corroborated by the bar owner's son, Gary Miller, Jr., who stated that Walker and the victim were told to leave.

According to Brown, she followed Walker, Johnson, and the victim after they left the bar. As the men departed the premises, *Walker walked as if there was something hidden under his coat. The three men walked single-file down Market street with Walker in front, the victim in the middle, and Johnson in the back.* The victim was aware that Brown was following them and he told her to go ahead of them.

Brown told the jury that she saw Walker turn and enter an alley off Market Street, followed by the victim, and that *Johnson remained at the entrance to that alley.* She then walked past them and almost

immediately thereafter heard a loud boom sound. According to Brown, *"they walked him [the victim] into that alley."* The alley was only four feet wide.

Brian Ramsey ("Ramsey"), a friend of the victim's, testified that he saw the victim immediately prior to the shooting near the bar and that the victim was with two or three other persons. He noticed that one of those persons was walking funny, as if with a limp. Ramsey told the jury that the victim and the others went to an alley, and specifically that *one person remained at the junction of the alley and sidewalk while the others entered the alley.* Ramsey testified that *"I would say that he [the victim] was forced in that alley."*

Aaron Dews ("Dews") testified that he was working on the night of the incident at Vision Youth Works, which was located adjacent to the alley where the victim was shot. Shortly after 12:45 a.m. on December 15, 1995, he heard a loud boom and when he looked out the window he saw *two silhouettes running up the driveway.*

Laura Davis, a patrol officer with the Harrisburg City Police Department, was patrolling the area in question on the morning of December 15, 1995 when she heard a very loud booming sound. She tried to determine the origin of the sound and did not notice anyone running from the crime scene. She drove around the neighborhood, talked to someone outside the Midnight Special Bar, and was told that the shot came from Market Street. Finally, she discovered the body of Taraja Williams, which was lying on the ground between two houses in an alley off of Market

Street. A partial shotgun was found near the victim and its barrel was missing.

The jury also learned that Doubs initially lied to the police officers investigating the incident by stating that she was with Johnson in New York at the time of the murder. Doubs misled the police because she was in jail and had been told *by a friend of Johnson's* and Walker's named Larry that she would receive money to post bail in exchange for the *fraudulent alibi information.* On the day following the murder, *Johnson fled via car and on foot when Detective Kevin Duffin of the Harrisburg City Police Department approached him to ask him some questions.*

Johnson filed a post-sentence motion alleging that the verdicts were not supported by sufficient evidence, which was denied by the state trial court. *See* Pet. App. 1g. On direct appeal in the state courts, Johnson argued that the verdicts were not supported by sufficient evidence and were against the weight of the evidence. The Pennsylvania Superior Court affirmed the judgment of sentence on the merits, finding that there was sufficient evidence to support the verdicts and that the verdicts were not against the weight of the evidence. *See* Pet. App. 1f. Johnson subsequently filed a petition for allowance of appeal in the Pennsylvania Supreme Court which was denied. *See* Pet. App. 1h.[1]

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[1] Between 1999 and 2004, Johnson pursued state post-conviction collateral relief. The claims, which are not relevant to the instant petition, were denied by

Johnson filed a timely *pro se* petition for *habeas corpus* relief in the District Court pursuant to 28 U.S.C. § 2254 on July 19, 2004. On March 6, 2007, Johnson filed a counseled memorandum of law in support of his habeas petition that advanced, among others,[2] a claim that the evidence presented at trial was insufficient to support the guilty verdicts, thereby violating Johnson's federal due process rights per *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). The Commonwealth filed a response to the habeas petition arguing that the *Jackson* claim was substantively meritless as well as procedurally defaulted.

On March 31, 2008, the District Court issued a 97-page memorandum opinion finding that although the *Jackson* habeas claim was not procedurally defaulted, it was substantively meritless. *See* Pet. App. 1d. The Court specifically found that the Pennsylvania courts' application of the Due Process Clause as construed by *Jackson v. Virginia* was objectively reasonable. The District Court also denied Johnson's remaining claims. Accordingly, the Court denied the relief requested and denied a certificate of appealability ("COA") on each issue.

Subsequently, the District Court granted a COA on the due process/evidentiary sufficiency claim after Johnson filed a motion to alter judgment solely in

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the state trial court, the determinations of which were upheld by the state appellate courts.

[2] Johnson's other habeas claims, ultimately unsuccessful, have no relevance to this petition.

connection with that particular claim. The District Court's decision to grant a COA was based on the fact that one of the three judges on the state Superior Court panel that affirmed the state trial court's finding of sufficient evidence to support the verdicts had dissented. *See* Pet. App. 1i.

Johnson filed a counseled notice of appeal on May 15, 2008. In addition to filing briefs and presenting oral argument in the Court of Appeals, the parties filed a combined total of 11 letters citing supplemental authority pursuant to Fed.R.A.P. 28(j). *See* Pet. App. 1j, 1k, 1l, 1m, 1n, 1o, 1p, 1q, 1r, 1s, and 1t. As these letters reflect, the parties substantially disagree about the meaning of this Court's jurisprudence -- including its most recent decisions[3] -- governing proper review of a *Jackson* claim by a federal habeas court.

On October 4, 2011, a divided Court of Appeals panel issued its judgment reversing the District Court's denial of habeas relief. In a non-precedential opinion, Judges McKee and Nygaard ("the panel majority") found that the state courts' adjudication of Johnson's first-degree murder and criminal conspiracy charges violated Johnson's federal due process rights under *Jackson* because the evidence of record was insufficient to prove beyond a reasonable

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[3] *See Cavazos v. Smith*, 132 S.Ct. 2 (2011); *Bobby v. Dixon*, 132 S.Ct 26 (2011); *Harrington v. Richter*, 131 S.Ct. 770 (2011); *Wilson v. Corcoran*, 131 S.Ct. 13 (2010); *McDaniel v. Brown*, 130 S.Ct. 665 (2010); *Renico v. Lett*, 130 U.S. 1855 (2010).

doubt that Johnson had an intent to kill the victim. According to the panel majority, the factual inference of an intent to kill that was drawn by the state courts from the trial record was unreasonable *because it did not "more likely than not flow from" the direct evidence presented at trial.* Therefore, the majority concluded that no rational trier of fact could possibly have found proof beyond a reasonable doubt of the requisite intent to kill.

Beyond the application of this unorthodox "preponderance of the evidence" test to factual inferences drawn by the state courts, the panel majority's opinion is remarkable for the following reasons: (1) the first paragraph states that "The sole question certified to us on appeal is *whether the evidence was sufficient to prove Johnson guilty...*" (as opposed to whether the state courts' application of *Jackson* was objectively reasonable); (2) its "preponderance of the evidence" test for factual inferences *derives from state evidentiary law;* (3) it rejects Carla Brown's testimony that Johnson and his codefendant "walked him [the victim] into that alley" because, *in the panel majority's opinion, Brown's testimony on the point was conflicting and unreliable;* (4) it rejects Brian Ramsey's testimony that "I would say he [the victim] was forced in that alley" because, *in the panel majority's opinion, Ramsey contradicted himself and "provided no facts to back up his opinion;"* and (5) its definition of accomplice liability *conflicts with Pennsylvania law.*[4]

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[4] Judge Chagares filed a dissenting opinion indicating that the state courts had reasonably applied federal

On October 21, 2011, the Commonwealth filed a timely petition for rehearing *en banc* in the Court of Appeals. *Ten days later, on October 31, 2011, this Honorable Court issued its decision in Cavazos v. Smith, 132 S.Ct. 2 (2011) that disposed of a state prisoner's habeas corpus challenge to a criminal conviction alleging a violation of Jackson v. Virginia in which the factual inferences drawn by the state court factfinders from the evidence presented at trial were the central focus.* Because this was on point, and because it was issued *after* the Court of Appeals had rendered its judgment of reversal but *before* it had ruled on the Commonwealth's petition for rehearing, the Commonwealth sought the Court of Appeals' permission to file a written supplement to its petition for rehearing addressing the arguable significance of *Cavazos* to the proper disposition of this case. *See* Pet. App. 1u. Following the filing of a responsive pleading by Johnson arguing that *Cavazos* has no relevance to this case, *see* Pet. App. 1v, Judge Nygaard entered an Order on November 8, 2011 denying without explanation the Commonwealth's request for permission to address the import of *Cavazos*. *See* Pet. App. 1w. The same day, the Court of Appeals issued an Order denying the petition for rehearing. *See* Pet. App. 1x.

Also on November 8, 2011, Johnson filed in the Court of Appeals a motion for expedited issuance of the writ of habeas corpus or in the alternative for the issuance of bail pending appeal, which was denied.

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law and that the District Court's denial of relief should be affirmed. See Pet. App. 1b.

On November 16, 2011, the Court of Appeals issued its mandate in this case.

Subsequently, Johnson's counsel filed a motion in the District Court seeking immediate issuance of the writ of habeas corpus or in the alternative release of Johnson on bail pending the outcome of the Commonwealth's efforts to obtain review and reversal by this Court. Following briefing, an evidentiary hearing, and argument, the District Court entered an order on January 17, 2012 which, among other things, immediately released Johnson from custody and held in abeyance the issuance of a writ of habeas corpus until this Honorable Court renders a decision on the instant petition. *See* Pet. App. 1y.

On January 30, 2012, the Commonwealth filed with this Court an application to extend the time to file a petition for writ of *certiorari* from February 6, 2012 to February 20, 2012. The Honorable Justice Samuel Alito graciously granted the application on February 1, 2012.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for writ of *certiorari* for multiple reasons.

A. The Court of Appeals' determination is based on a finding that the Pennsylvania courts misapplied Pennsylvania law and is therefore in derogation of this Court's holdings that it is not the province of a federal habeas court to examine state court application of state law and that only noncompliance with clearly-established federal law will render a state's criminal judgment susceptible to collateral attack in federal court.

The linchpin of the Court of Appeal's *Jackson* analysis -- an insistence that factual inferences may only be drawn in favor of the prosecution if they "more likely than not flow from" the direct evidence -- is not clearly-established federal law as determined by this Court but instead derives from *Pennsylvania evidentiary law*. *See Commonwealth v. McFarland*, 308 A.2d 592, 594 (Pa. 1973), which the panel majority cites for its proposition. In total, the panel majority cites two Pennsylvania Supreme Court decisions and three Pennsylvania Superior Court decisions as legal authority governing the drawing of factual inferences. Notably, only one of the five published state court decisions cited by the Court of Appeals actually articulates the "more likely than not" concept; the other four published decisions -- including a state Supreme Court decision that was issued *after McFarland* -- articulate varying other standards.

Although the panel majority also cites to two decisions of this Court in support of its "more likely than not" rule, those decisions do not address the reasonableness of a factual inference in the context of a *Jackson* sufficiency-of-the-evidence analysis but instead assess *the constitutionality of federal statutes that create permissible inferences of guilt based on proof of specifically-enumerated facts. See Turner v. United States*, 396 U.S. 398, 405 (1970); *Leary v. United States*, 395 U.S. 6, 36 (1969). These decisions, therefore, are inapposite to the instant case and the panel majority's reliance on them without acknowledging the distinction was obviously in error.

Indeed, this Court's decisional law governing habeas corpus claims alleging a violation of *Jackson* makes absolutely no reference whatsoever to the "more likely than not" concept relied upon by the panel majority in this case. To the contrary, in *Cavazos v. Smith*, 132 S.Ct. 2 (2011), this Court recently disposed of a *Jackson* claim in the context of federal habeas corpus review and emphasized the deference which a federal court must show to a state court jury's factual inferences drawn from the record developed at trial. In the words of the Court, *"it is the responsibility of the jury -- not the court -- to decide what conclusions should be drawn from evidence admitted at trial." Cavazos*, 132 S.Ct. at 3.

Consequently, the panel majority's determination that habeas relief should be granted is *based on a finding that the state courts misapplied state law.* This directly conflicts with this Court's holdings that only noncompliance with *federal law* will render a state's criminal judgment susceptible to collateral

attack in the federal courts and that it is not the province of a federal habeas court to reexamine state court determinations on state law matters. *See Wilson v. Corcoran*, 131 S.Ct. 13 (2010); *McDaniel v. Brown*, 130 S.Ct. 665 (2010); *see also Bobby v. Dixon*, 132 S.Ct. 26 (2011) (habeas relief may not be granted on the basis that the state courts failed to apply a legal principle which has never been established by the Supreme Court).

B. The Court of Appeals' refusal to credit factual inferences favorable to the prosecution in connection with its *Jackson* analysis due to its subjective view that those inferences do not "more likely than not flow from" the trial evidence directly conflicts with this Court's holdings that a federal habeas court conducting a *Jackson* review must view the evidence in the light most favorable to the prosecution, presume that the jury resolved any conflicting factual inferences in favor of the prosecution, and defer to that resolution.

The panel majority refused to credit the inference available to the jury from the record evidence that Johnson possessed an intent to kill the victim. This determination, based on the panel majority's subjective belief that the inference does not "more likely than not flow from" the trial evidence, directly conflicts with this Court's holdings that a federal habeas court conducting a *Jackson* review is prohibited from substituting its judgment for that of the jury and must view the evidence in the light most favorable to the prosecution. As the Court has stated, this means that the reviewing court: (a) must assume

that the jury credited all evidence that supported the prosecution's case and ask whether such evidence gave the jury *an ability to reach its conclusion* rather than ask whether the jury *reasonably should have reached its conclusion*; and (b) when faced with facts that give rise to conflicting inferences, *must presume that the jury resolved such conflicts in favor of the prosecution and must defer to that resolution.* *See Cavazos*, 132 S.Ct. 2; *McDaniel v. Brown*, 130 S.Ct. 665 (2010); *Schlup v. Delo*, 513 U.S. 298 (1995); *Wright v. West*, 505 U.S. 277 (1992); *Jackson v. Virginia*, 443 U.S. 307 (1979).

C. The Court of Appeals' determination patently relies upon its own subjective conclusions regarding witness credibility and the proper weight to be accorded the record evidence in contravention of this Court's repeated admonitions that a federal habeas court conducting a *Jackson* review is strictly forbidden from substituting its judgment for that of the jury on weight and credibility issues.

The panel majority's opinion repeatedly states that the Court's task in this habeas corpus appeal was *to assess the sufficiency of the evidence to prove Johnson guilty of first-degree murder and criminal conspiracy.*[5] Remarkably, in performing that misapprehended role and arriving at its conclusions, the panel majority makes numerous determinations

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[5] *See* Pet. App. 2a, 20a, 27a, 28a.

regarding the proper weight to be accorded specific evidence and the credibility to be attributed to specific prosecution witnesses.

For example, with regard to Commonwealth witness Brian Ramsey, the majority states:

> Further, the Commonwealth relied on Brian Ramsey's opinion that Williams was "forced" into the alley as evidence of Johnson's intent. ***Reliance on Ramsey's testimony to establish intent is unreasonable.*** Brian Ramsey testified that he did not see the victim enter the alley and did not describe any physical action in his testimony that would lead to a reasonable inference that anyone "forced" the victim into the alley...
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> * * *
>
> *Ramsey contradicts himself. First he comments that the victim was forced into the alley, and then testifies that he only saw the victim walk into the alley.* Although not mentioned as evidence by the Superior Court, the District Court accepts Ramsey's opinion that Williams was "forced" into the alley as fact. Ramsey provided no facts to back up his opinion, nor did he identify who "forced" the victim into the alley. Without more, it is unreasonable to rely on this evidence to establish an inference that Johnson intended to kill Williams.

Pet. App. 22a-23a (emphasis added) (footnote omitted). With regard to Commonwealth witness Carla Brown, the majority states:

> Likewise, [Brown's testimony] that Johnson walked with Walker and the victim to an alley is not evidence of specific intent to kill Williams. Brown, who also followed the three men out of the bar and down the street, testified that they walked in a "single file line." She testified that Johnson "never went in [to the alley]," but at another point in her testimony related that "they walked him in that alley." Later, in a summary of her testimony, she related that "all I know is who walked him [into] that alley and who stood in front of the alley." The Commonwealth relied on Brown's testimony that the victim was "walked" into the alley as evidence of Johnson's specific intent. *If Brown had testified that Johnson actively pushed, shoved, ordered or otherwise forced the victim into the alley, or prevented him from leaving it, it would be reasonable to infer Johnson's specific intent...*

Pet. App. 22a (emphasis added).

These excerpts illustrate the manner in which the Court of Appeals improperly substitutes its judgment for that of the jury. Although the testimony of Brown and Ramsey conveying their personal observations that Johnson and Walker "walked" and "forced" the victim into the alley obviously constituted

strong circumstantial evidence of Johnson's mental culpability, *the lower court discounts it because, in its own estimation, the witnesses gave conflicting testimony and failed to support their statements with sufficient corroborating proof.*

Such a determination conflicts with this Court's decision in *McDaniel v. Brown*, 130 S.Ct. 665 (2010), which rebuked the United States Court of Appeals for the Ninth Circuit for improperly focusing on inconsistencies and conflicts in witness testimony in arriving at a conclusion that the state courts had convicted the prisoner in violation of *Jackson*. According to the Court, "The Court of Appeals acknowledged that it must review the evidence in the light most favorable to the prosecution, but *the court's recitation of inconsistencies in the testimony shows it failed to do that.*" *McDaniel*, 130 S.Ct. at 673 (emphasis added).

This Court's decisional authority is unequivocal that a federal habeas court conducting a *Jackson* review is: (1) absolutely prohibited from substituting its judgment for that of the jury on weight and credibility issues; (2) required to assume that the jury resolved all weight and credibility issues in the prosecution's favor; and (3) not permitted to grant habeas corpus relief merely because it disagrees with the state courts' decision or would have reached a different result had it been the factfinder. *See Cavazos*, 132 S.Ct. 2; *Wood v. Allen*, 130 S.Ct. 841 (2010); *McDaniel*, 130 S.Ct. 665; *Schriro v. Landrigan*, 550 U.S. 465 (2007); *Schlup*, 513 U.S. 298; *Jackson*, 443 U.S. 307.

D. **The Court of Appeals' determination relied upon a definition of accomplice liability that conflicts with Pennsylvania law and therefore conflicts with this Court's holdings that a federal habeas court engaging in a *Jackson* analysis must apply the substantive elements of the criminal offense as defined by state law.**

The panel majority's decision relies on a determination that because the evidence does not support a finding that Johnson was an "active partner" with his codefendant in the shooting, the conviction for murder as an accomplice was improper under *Jackson*.[6] Pennsylvania law on accomplice liability, however, *does not require proof of an active partnership in commission of the crime, but rather states that "the least degree of concert or collusion is sufficient* to sustain a finding of responsibility as an accomplice." *Commonwealth v. Cocciolletti*, 425 A.2d 387, 390 (Pa. 1981). Under state law, the amount of aid that must be given to a principal in order to qualify someone as a criminal accomplice *"is not*

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[6] *See* panel majority opinion at 17, which incorrectly cites *Commonwealth v. Cox*, 863 A.2d 536, 551 (Pa. 2004) for the proposition that "Commonwealth must prove beyond a reasonable doubt that the person charged as an accomplice was an active partner *in the crime...*" In fact, the language referred to in *Cox* actually states that to be an accomplice, the person must be "a direct active partner *in the intent to commit [the crime]."*

substantial." Commonwealth v. Murphy, 844 A.2d 1228, 1234 (Pa. 2004).

The majority's opinion requiring proof of an "active partnership" in the crime, i.e. clearly substantial involvement, therefore conflicts with this Court's dictate that when engaging in a *Jackson* analysis, a federal habeas court *must apply the substantive elements of the criminal offense as defined by state law. See Jackson*, 443 U.S. 307.[7]

E. **The Court of Appeals' *de facto* finding that the state courts' conviction was based on an unreasonable determination of the facts in light of the evidence presented fails to acknowledge or address the presumption of correctness that must be afforded the factual inferences drawn by the state courts pursuant to 28 U.S.C. § 2254(e)(1) and therefore conflicts with this Court's holdings that the presumption of correctness afforded state court factual findings cannot be overridden absent clear and convincing contrary evidence.**

Although the panel majority characterizes its decision as finding an unreasonable application by the

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[7] For reasons not apparent, the majority opinion simply omits any reference whatsoever to the well-established principle in Pennsylvania criminal law that the *least degree* of concert or collusion will suffice to establish accomplice liability.

state courts of federal law set forth in *Jackson*, close analysis reveals that the decision -- which is based on a finding that the state courts improperly relied on invalid factual inferences -- *constitutes a finding that the state courts' decision was based on an unreasonable determination of the facts in light of the evidence presented.*

Because the panel majority, in the context of this determination, failed to acknowledge or address the presumption of correctness that must be afforded to the factual inferences drawn by the state courts pursuant to 28 U.S.C. § 2254(e)(1), its decision conflicts with this Court's caselaw holding that the presumption of correctness afforded state court factual findings cannot be overridden absent clear and convincing contrary evidence. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003). It also conflicts with the Court's holding that "even if '[r]easonable minds reviewing the record might disagree' about the [factual] finding in question, 'on habeas review that does not suffice to supersede the trial court's ... determination.'" *Wood*, 130 S.Ct. at 849 (2010); *Rice v. Collins*, 546 U.S. 333, 341-342 (2006).

In this case, it certainly cannot be said that there is *clear and convincing* evidence that contradicts the state courts' determination that Johnson had an intent to kill and colluded with Walker in the murder of Taraja Williams. Johnson does not allege this and the Court of Appeals majority panel does not find this. For this reason, the Court of Appeals' grant of habeas relief is infirm.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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Date: February 21, 2012

APPENDIX

RECORD AND BRIEFS

11-1053

Supreme Court, U.S.
FILED
FEB 21 2012
OFFICE OF THE CLERK

No. 00-0000

IN THE SUPREME COURT OF THE UNITED STATES

NEAL MECHLING, SUPERINTENDANT STATE CORRECTIONAL INSTITUTION AT FAYETTE, PENNSYLVANIA; COMMONWEALTH OF PENNSYLVANIA
Petitioners

v.

LORENZO JOHNSON
Respondent

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDICES TO PETITION FOR WRIT OF *CERTIORARI*

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LORENZO JOHNSON PETITION FOR WRIT OF CERT APPENDICES

Appendix	Document
A	Court of Appeals Panel Majority Opinion
B	Court of Appeals Panel Minority Opinion
C	Court of Appeals Order Dated October 4, 2011
D	District Court Opinion Dated March 31, 2008
E	District Court Order Dated March 31, 2008
F	Pennsylvania Superior Court Opinion Dated September 28, 1998
G	State Trial Court Opinion Dated August 25, 1997
H	Pennsylvania Supreme Court Order Dated February 25, 1999
I	District Court Memorandum And Order Granting COA Dated May 15, 2008
J	Johnson's Letter 9/4/09
K	Commonwealth's Letter 9/28/09
L	Commonwealth's Letter 10/2/09
M	Johnson's Letter 10/5/09
N	Commonwealth's Letter 10/6/09
O	Johnson's Letter 1/12/10
P	Johnson's Letter 1/19/10
Q	Commonwealth's Letter 1/21/10
R	Johnson's Letter 1/21/10
S	Commonwealth's Letter 11/9/10
T	Johnson's Letter 11/15/10

Appendix	Document
U	Commonwealth's Motion For Leave To File Supplement to Pending Petition for Rehearing *En Banc*
V	Johnson's Response To Motion For Leave To File Supplement to Pending Petition for Rehearing *En Banc*
W	Court of Appeals Order Denying Motion To Supplement Pending Petition for Rehearing *En Banc*
X	Court of Appeals Order Denying Rehearing
Y	District Court Order Dated January 17, 2012

Appendix A

NOT PRECEDENTIAL
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2477

LORENZO JOHNSON, Appellant

v.

NEAL MECHLING,SUPERINTENDENT;
COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 4-04-cv-01564)
District Judge: The Honorable John E. Jones, III

ARGUED SEPTEMBER 30, 2009

BEFORE: McKEE, Chief Judge, CHAGARES, and
NYGAARD, Circuit Judges. (Filed October 4, 2011)

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OPINION OF THE COURT

NYGAARD, Circuit Judge

Corey Walker murdered Taraja Williams. At a joint trial, Petitioner Lorenzo Johnson was convicted as Walker's accomplice and co-conspirator in this murder. Johnson appeals the District Court's denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The sole question certified to us on appeal is whether the evidence was sufficient to prove Johnson guilty of first degree murder and conspiracy to commit murder

I.

Because the only issue before us is the sufficiency of the evidence, we must recount the

evidence that was developed at trial in some detail. We state the facts in the light most favorable to the Commonwealth, and will draw all reasonable inferences from those facts in the Commonwealth's favor. See *United States v. Dent*, 149 F.3d 180, 187 (3d Cir. 1998). With this standard of review in mind, we turn to the District Court's recitation and summary of the trial evidence. The first witness to testify was Laura Davis, a patrol officer with the Harrisburg Bureau of Police. Officer Davis testified that she was on patrol in the early morning hours of December 15, 1995, when she heard a loud booming sound nearby. Officer Davis began to search for the source of the sound and encountered individuals who told her that someone had been shot in an alley between two houses on Market Street. Officer Davis then encountered a crowd of people in front of the Midnight Special bar, located

on 14th and Market Streets, and an individual there indicated he heard a shot in the 1400 block of Market Street. After Officer Davis searched further, an individual waved her over to an alley between 1420 and 1422 Market Street where she discovered the body of Taraja Williams. The alley was about four feet wide and extended eight to ten feet back to a fence. The body was just inside the alley.

The next witness was Leroy Lucas, a member of the Harrisburg police department's forensics unit. When Officer Lucas arrived at the crime scene, he saw many footprints leading from the victim into the alley toward the six-foot fence and on the other side of the fence through the alley. Officer Lucas also recovered from the scene a partial shotgun with the barrel missing. The officer testified that the body of the victim lay

approximately ten feet from the fence, relatively close to the sidewalk at the entrance to the alley.

Gary Miller, the son of the owner of the Midnight Special bar, testified that he was working at the bar the night of December 14-15, 2005, and recalled seeing Williams and Corey Walker in the bar. He did not recall seeing Lorenzo Johnson. Miller testified that he was working when he heard the doorman yelling you all got to take that out of here and then went to the door where he saw Walker and Williams leaving.

Carla Brown, a friend of the victim, testified next. Brown testified that she was in the bar on the night of December 14-15, 2005, and saw Walker, Johnson, and Williams engaged in an argument. Brown could not hear what was said or who was speaking, but the argument involved a lot of "arm movements." Before long, the bouncer told them to

leave. Brown followed Walker, Johnson, and Williams as they left the bar "because she wanted to know what was going on." Brown recalled that Walker was wearing a long leather coat and walked as if he had something hidden under it. The three men walked in a single-file line with Walker in the front, Williams in the middle, and Johnson in the back. Brown followed slowly behind with her hood up. Walker and Johnson did not notice her, but Williams, who knew her, did. The three men continued walking single file until they reached the alley where Walker entered first, Williams entered next, and Johnson remained at the entrance. As she approached the alley, Williams told Brown to keep going. Brown walked a few feet beyond the alley when she heard a loud boom and ran.

Brown admitted that she had been addicted to drugs and that she was high on cocaine at the

time of the killing. According to Brown, the amount of drugs in her system on the night of the murder, on a scale of one to ten, was a seven. She also stated that after the incident she ran to a friend's house and got high. Brown testified, however, that she had been clean for nine months and was currently employed. Brown admitted that, at the preliminary hearing, she had testified that she was drunk at the time of the incident but not on drugs. Brown testified that she did not contact police because she was scared that she would be killed. Brown admitted that, when she was first contacted by police, she told them she knew nothing about the incident. Brown also testified that although she knew who Victoria Doubs (another trial witness) was after being shown a photograph of her, she was not friends with Doubs and had never talked to Doubs about the incident.

The next witness was Aaron Dews, an in-house advisor at Visions Youth Works which was located in one of the buildings bordering the alley. Dews testified that he and another staff member heard a loud boom on the night of the incident. After first checking to see if it was the furnace, Dews looked out the window and saw two silhouettes running up the driveway away from the house. Dews stated that he could not see the two individuals in detail because there was plastic over the window.

Brian Ramsey, a friend of the victim, was the next witness. Ramsey testified that Williams was a cocaine addict who sometimes sold drugs to support his habit. He stated that he knew who Walker and Johnson were and that he had seen them together most of the time. Ramsey testified that on the night of the incident, he was selling drugs on Market

Street near the Midnight Special bar. Williams was also out on Market making runs for drug dealers that night. Ramsey first testified that, when he last saw Williams, he was moving into an alley with two individuals. On cross-examination, Ramsey corrected himself, stating that he saw three individuals with Williams, one female and two males. This testimony was consistent with the statement he gave police on the night of the incident. Ramsey testified that one of the individuals with Williams walked with a limp, so Ramsey assumed it was a crippled guy whom he knew to be a drug dealer. Ramsey stated he assumed Williams was in the alley to make a drug deal.

A minute after Ramsey saw Williams and the other individuals enter the alley, he heard a loud boom. After Ramsey heard the sound, he

walked around the block. When he returned, he noticed Walker and Johnson among the crowd of people in front of the Midnight Special bar. Ramsey testified that Walker and Johnson seemed stunned, "like sort of maced like what happened, Taraja has been killed . . . are you serious?" Ramsey admitted that he was serving a sentence in Dauphin County Prison, that he was under the influence of cocaine on the night of the incident, and that although he was still a drug addict, he was in recovery.

The next witness was Detective Kevin Duffin of the Harrisburg Bureau of Police, who investigated the Williams murder. Detective Duffin testified that, about twelve hours later, on December 15, 1995, he was in an unmarked car when he approached three individuals in a brown Ford. The Ford sped away at a high rate of speed. Detective Duffin placed a flashing light on the roof

of his car and followed the Ford. When the Ford struck another car, the three occupants fled on foot. Two of the individuals were apprehended. One of them was Lorenzo Johnson, the petitioner.

The next witness, Victoria Doubs, testified that she, Walker, and Johnson were close friends who ran the streets together. On December 14, 1995, Doubs, Walker, and Johnson woke up together in a house at 18th and Carnation Streets. They went out to buy some marijuana and then went to a Kentucky Fried Chicken restaurant near 14th and Market Streets. When Williams approached, Walker went over to talk to him and the two of them walked back toward Johnson and Doubs. Doubs testified that Walker and Williams were talking about the money that Taraja [Williams] had owed us. Walker continued to confront Williams about the money. Williams

started getting smart, began "cussing out" Walker, and told "him he'd give it to him when he felt like and he ain't scared of him." Walker hit Williams and they started to fight. Williams won the fight, beating Walker with a broomstick.

Many people saw Williams beat Walker, which made Walker angry. After the fight, Walker, Johnson, and Doubs left. Doubs and others laughed at Walker and made jokes. Walker stated "I'm going to kill that crackhead. I'm going to kill that kid." Doubs testified that Walker "was hot. He was heated." Johnson was present when Walker made these statements. Walker, Johnson, and Doubs returned to the house at 18th and Carnation Streets where others were told about the fight and also made fun of Walker. This made Walker angry and he repeated that he was going to kill that kid.

Doubs testified that she first told police that late on the night of December 14, 1995, she, Johnson, Suquan Ripply, "a guy named Cliff, and a girl named ReeRee" were on their way to New York. The next time Doubs met with police, however, she told them that she had lied and did not actually recall being in New York on the night of the murder. Doubs told police that she had made up her initial statement because Ashe was going to be paid to tell that story.... [M]y bail was supposed to be paid. Doubs explained that one of Walker and Johnson's friends named Larry was going to pay her to tell the story to police. Doubs stated that she went to New York with this same group two to three times a week, but could not say that she was in New York with Johnson on December 14 or 15, 1995.

Finally, Doubs testified that sometime after Williams' death, she ran into Carla Brown and that the two of them got high together. Doubs testified that, while they were smoking crack together, Brown stated that Walker had given her a couple of crack rocks to take Williams into the alley on the night of the murder. On cross-examination, Doubs admitted that she had a conviction for forgery in connection with stolen checks. Doubs also admitted that she was in Dauphin County Prison on a robbery conviction.

Sergeant Frederick Wentling of the Pennsylvania State Police testified about the partial shotgun recovered from the crime scene. Suquan Ripply also testified. Ripply was one of the individuals who fled from Detective Duffin on December 15, 1995. Ripply first testified that he, Johnson, David Hairston, Vicki Doubs, a man

named Clifton, and a woman named Ree-Ree left Harrisburg for New York around 4:00 p.m. on December 14, 1995 and did not return until 4:00 a.m. on December 15, 1995. Ripply admitted that he had initially told police this same story, but later told police that this story was false and that he was not in New York with Johnson on the night of the murder. On the stand, Ripply testified that his first statement was actually correct and that he told Detective Duffin what he wanted to hear after the detective told him he would be charged with perjury if he was lying. On re-cross examination, Ripply admitted that he made the trip to New York with Johnson many times, that he "was off with the dates" when he made his first statement to police, and was "not exactly" sure whether he was with Johnson in New York on December 14 or December 15.

Dr. Wayne Ross, a medical examiner, testified next and related that the cause of Williams' death was a shotgun wound to the chest. Eric Chambers, the bouncer at the Midnight Special bar on the night of the incident, saw Williams and others get kicked out, but did not see Johnson there that night.

The next witness, Lashawyn Jackson, was Walker's girlfriend and testified that Walker was with her in the Midnight Special bar all night on December 14-15, 1995. On cross-examination, however, Jackson was uncertain of the date that she and Walker were in the bar. Jackson also admitted that she never contacted the police to provide this information after Walker's arrest. The final witness, Clifton Germaine, was a friend of Walker and Johnson who testified that on a date he could not remember Johnson, and a woman whose

name he could not remember went with him to New York. Germaine did not know who Suquan Ripply or Victoria Doubs were.

II.

Following a joint three-day jury trial in the Dauphin County Court of Common Pleas, Walker was found guilty of murder in the first degree and criminal conspiracy to commit murder. Johnson was found guilty as Walker's accomplice on the murder charge and guilty on the conspiracy charge as well. Johnson and Walker were both sentenced to mandatory life imprisonment on the murder conviction and concurrent terms of five to ten years of imprisonment on the conspiracy conviction.

In a post-trial motion to the Court of Common Pleas, Johnson challenged the Commonwealth's evidence as insufficient to convict

him of homicide and conspiracy. The Common Pleas Court denied Johnson's motion, holding:

> We have reviewed the evidence as outlined above and conclude that the evidence was sufficient to sustain the verdicts. The Commonwealth presented the testimony of Carla Brown who followed the two defendants and the victim in the alley where the victim was ultimately shot. She stated that Corey Walker was walking with a limp and it looked to her as if he was concealing something under his coat. Victoria Doubs' testimony provides a motive for the defendants' attack. She stated that earlier on the day of the incident, the victim and Corey Walker had an altercation and that the victim embarrassed the defendant [Walker] in front of his friends and associates. She stated that the defendant [Walker] repeatedly remarked that he was going to kill the victim. Although both defense counsel tried to discredit this witness' testimony based on her character, prior convictions and current incarceration, it was solely within the province of the jury to determine whether her testimony was credible. Both defendants presented alibi witnesses who testified that they were not in the vicinity of the shooting at the time of incident. Suquan Ripply testified that Lorenzo Johnson was with him in New

> York at the time of the incident and Corey Walker's girlfriend, Lashawnyn [sic] Jackson, testified that Corey was with her at the Midnight Special Bar the entire evening of the incident. Again, it was for the jury to determine whether the purported alibi defenses were meritorious.

Johnson and Walker jointly appealed. Johnson argued that the evidence adduced at trial was insufficient as a matter of law to sustain a guilty verdict and that the verdict was against the weight of evidence. After adopting the Common Pleas Court's recapitulation of the evidence, the Superior Court affirmed both convictions and sentences, holding:

> We conclude that sufficient evidence was presented to support the jury's verdict. The various witnesses' statements revealed that Lorenzo Johnson, Corey Walker and the victim were arguing inside the Midnight Special bar and were told to leave. The trio walked out, with the victim between Lorenzo Johnson and Corey Walker. They proceeded into an alley, and a shot was heard. Two men were

> observed fleeing the scene, and the victim's body was discovered in the alley. Presented with this evidence, the jury had a sound basis upon which to conclude that a conspiracy existed between Lorenzo Johnson and Corey Walker to murder Taraja Williams.

Commonwealth v. Johnson, 726 A.2d 1079 (Pa. Super. Ct. 1998). One Superior Court Judge dissented, finding the evidence against Johnson insufficient:

> I dissent from that portion of the Majority's decision which upholds the conviction of Lorenzo Johnson for first degree murder and criminal conspiracy . . . I believe that there is no direct evidence, nor can any be inferred, linking defendant Johnson to the death of Taraja Williams nor any agreement with defendant Walker which resulted in Williams' death.

Id. Like the trial court, the Superior Court did not mention or analyze the elements of the offense of first-degree murder--the foregoing is the extent of its sufficiency of the evidence analysis.

Johnson next filed a petition for allowance of appeal with the Pennsylvania Supreme Court, again arguing that the evidence was insufficient to support his convictions and that the verdict was against the weight of the evidence. The Pennsylvania Supreme Court denied the petition without opinion. Commonwealth v. Johnson, 737 A.2d 741 (Pa. 1999).

Johnson petitioned for relief under Pennsylvania's Post Conviction Relief Act (PCRA), raising several grounds for relief. Following an evidentiary hearing, the Court of Common Pleas denied each of Johnson's claims and Johnson appealed to the Superior Court, reasserting the same grounds for relief. The Superior Court affirmed the denial of Johnson's PCRA petition.[1]

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1. While an appeal of his first PCRA petition was pending in the Superior Court, Johnson filed a second petition in the trial court, raising a claim of

Johnson filed a petition for allowance of appeal with the Pennsylvania Supreme Court which was denied without opinion.

After exhausting his available remedies in state court, Johnson filed a petition for a writ of habeas corpus in the United States District Court. In his petition, Johnson alleged that: (1) the evidence presented at trial was insufficient to support the guilty verdicts, thereby violating his rights to due process under Jackson v. Virginia, 443 U.S. 307 (1979); (2) that the Commonwealth failed to disclose the existence of a plea agreement with its

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after-discovered evidence. An affidavit had been obtained from Brian Ramsey, one of the Commonwealth's trial witnesses. In this affidavit, Ramsey recants his trial testimony. He avers that while he told police he saw both Walker and Johnson at the scene of the crime, he really only saw Walker. Ramsey indicated that he just assumed that since I saw Mr. Walker, that Mr. Johnson was somewhere in the midst of the crowd, but I actually never saw Mr. Johnson.

trial witness, Victoria Doubs, thereby violating his rights to due process under Brady v. Maryland, 373 U.S. 83 (1963); and (3) that his trial counsel's performance was ineffective, violating his Sixth Amendment rights. The District Court denied relief on all three of Johnson's claims. The District Court later amended its judgment, and granted Johnson a certificate of appealability on the question of whether there was sufficient evidence to convict him of first-degree murder and conspiracy, a question we now address.

III.

A.

Our jurisdiction is based on 28 U.S.C. 1291 and 2253. The District Court had jurisdiction pursuant to 28 U.S.C. " 2241 and 2254. Because the District Court ruled on Johnson's habeas corpus petition without conducting an evidentiary hearing,

our review of the District Court's decision is plenary. Marshall v. Hendricks, 307 F.3d 36, 50 (3d Cir. 2002). Review of state court determinations is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA), codified at 28 U.S.C. 2254(d). AEDPA provides that

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. 2254(d). State court application of federal law is contrary to clearly established federal law under 2254(d)(1) if the state court arrives at a conclusion opposite to that reached

by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts. Marshall, 307 F.3d at 51 quoting Williams v. Taylor, 529 U.S. 362, 413 (2000) (Connor, J., concurring). The state court's application of federal law is unreasonable where the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. Williams, 529 U.S. at 413; see also Lambert v. Blackwell, 387 F.3d 210, 234 (3d Cir. 2004). The state court's decision must also have been objectively unreasonable. Wiggins v. Smith, 539 U.S. 510, 520 (2003); Williams, 529 U.S. at 409 (Stated simply, a federal habeas court making the unreasonable application inquiry should ask

whether the state court's application of clearly established federal law was objectively unreasonable.).

B.

Following the standard set forth in AEDPA, we must first determine whether the Pennsylvania Superior Court's denial of Johnson's adjudication of the merits of the sufficiency of the evidence claim was contrary to, or an unreasonable application of, clearly established federal law. [2]

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[2] "We have interpreted § 2254(d)'s adjudication on the merits language to mean that when, although properly preserved by the defendant, the state court has not reached the merits of a claim thereafter presented to a federal habeas court, the deferential standards provided by AEDPA . . . do not apply. Holloway v. Horn, 355 F.3d 707, 718 (3d Cir. 2004) (quoting Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001)) (additional citations omitted). The Superior Court's opinion notes that Johnson challenges the sufficiency of the evidence and applies the correct standard of review: in addressing a challenge to the sufficiency of the evidence, this court must view the evidence admitted at trial in the light most favorable to the

We agree with the District Court that the state court incorporated the proper federal standard; therefore, it was not contrary to clearly established law. The question remains whether the Superior Court's determination that there was sufficient evidence for a rational trier of fact to infer intent was an unreasonable application of that federal standard.

Commonwealth, as verdict winner, and draw all reasonable inferences therefrom. 726 A.2d 1079. Although the Superior Court's discussion was sparse and its analysis conclusory, we find that the Superior Court adjudicated Johnson's sufficiency claims on the merits. The Superior Court's opinion concluded that the evidence was sufficient to uphold the verdicts and also noted that circumstantial evidence can be sufficient to convict a defendant of first degree murder. The dissenting judge disagreed with the majority's decision which upholds the conviction of Lorenzo Johnson for first degree murder and criminal conspiracy, clearly contemplating sufficiency claims as to both charges. Consequently, AEDPA standards govern and we will review the sufficiency challenge to Johnson's conviction under those rubrics.

The applicable clearly established federal standard is set out by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). "The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt of each element of the offense. Id. at 309. However, "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." Id. at 317. A[W]hen such a conviction occurs in a state trial, it cannot constitutionally stand." Id. at 318. A reviewing court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319 (emphasis in original). This "standard must be applied with explicit

reference to the substantive elements of the criminal offense as defined by state law." Id. at 324 n.16.[3] We look to Pennsylvania law only to establish the elements of the offense and then we turn to the federal question of whether the Superior Court was objectively unreasonable in concluding that sufficient evidence supported Johnson's convictions. See id. at 324 n.16.

C.

A Pennsylvania statute defines first-degree murder as an "intentional killing." 18 Pa. Con.

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3. The Commonwealth argues that Johnson waived the issue of the sufficiency of the evidence to establish his intent to kill by not specifically raising it in the District Court. Johnson has preserved this issue. He argued to the District Court that in order to establish his intent to kill, the Commonwealth needed to show that Johnson "possessed a shared criminal intent with Walker, and that acting with such intent, he [Johnson] aided or abetted the commission or planning of the offense." Petitioner's Memorandum of Law in Support of Petition for a Writ of Habeas Corpus. We therefore reject the Commonwealth's waiver argument.

Stat. Ann. § 2502(a). An "intentional killing" is further defined by statute as killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing." 18 Pa. Con. Stat. Ann. § 2592(d). Johnson was found guilty of first-degree murder as an accomplice. Under Pennsylvania law, one is an accomplice if, "with the intent of promoting or facilitating the commission of the offense," he or she either "solicits such other person to commit [the crime]," or "aids or agrees or attempts to aid such other person in planning or committing [the offense]." 18 Pa. Con. Stat. Ann. § 306(c)(1)(i) and (ii); see also *Everett v. Beard*, 290 F.3d 500, 512 (3d Cir. 2002) (to find an accomplice guilty of first-degree murder, the jury must find that the accomplice shared the killer's specific intent to kill); *Commonwealth v. Cox*, 863 A.2d 536, 551 (Pa. 2004) (Commonwealth must

prove beyond a reasonable doubt that the person charged as an accomplice was an active partner in the crime who shared with the principal the criminal intent necessary to convict for the underlying crime and who actively induced, encouraged or aided the principal in the commission of the underlying crime). Viewing the evidence in a light most favorable to the Commonwealth, and drawing all reasonable inferences from the evidence, we conclude that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319.

As we have indicated, a conviction will survive a due process challenge if the record contains sufficient evidence to permit any reasonable fact finder to conclude that Johnson, as an active partner, shared Walker's intent to kill

Williams and that Johnson acted in such a way as to encourage or facilitate Williams' murder. See *Smith v. Horn*, 120 F.3d 400, 410 (3d Cir. 1997) (citing 18 Pa. Con. Stat. Ann. § 2502(a)). In cases like this, where Johnson was not the shooter, the Pennsylvania Supreme Court has noted the difficulty in securing a first-degree murder conviction based solely on accomplice liability: "where the accomplice was not the shooter, proof of that shared intent generally is no easy task." *Commonwealth v. Raymond Johnson*, 966 A.2d 523, 543 (Pa. 2009).

Not surprisingly, the Commonwealth offered no direct proof of Johnson's intentions relying instead on circumstantial evidence and the inferences that can be drawn therefrom. See, e.g., *Commonwealth v. Murphy*, 844 A.2d 1228, 1238 (Pa. 2004); *Commonwealth v. Ford*, 650 A.2d 433,

437 (Pa. 1994) (specific intent to commit crime may be established through defendant's words or acts, or circumstantial evidence, considered with all reasonable inferences from that evidence). It is essential "that there be a logical and convincing connection between the facts established and the conclusion inferred." *United States v. Bycer*, 593 F.2d 549, 550 (3d Cir. 1979). Put another way, "[t]he difference between an inference and a speculation is that an inference is a reasoned deduction from the evidence, a speculation is a guess." *Commonwealth v. Konz*, 402 A.2d 692, 700 (Pa. Super. Ct. 1979). "If an inference is merely one of two or more possibilities of roughly equal appeal or probability, then the proposition has not been proven beyond reasonable doubt and the verdict is a product of speculation and conjecture."

Commonwealth v. Gruff, 822 A.2d 773, 788 (Pa. Super. Ct. 2003).

For an inference to be reasonable, it "must flow from facts and circumstances proven in the record, and must be of such volume and quality as to overcome the presumption of innocence and satisfy the jury of an accused's guilt beyond a reasonable doubt." *Commonwealth v. Bostick*, 958 A.2d 543, 560 (Pa. Super. Ct. 2008). That is to say, a reasonable inference is one where the fact inferred is "more likely than not to flow from the proved fact on which it is made to depend." *Commonwealth v. McFarland*, 308 A.2d 592, 594 (Pa. 1973) quoting Turner v. United States, 395 U.S. 398, 405 (1970). The trier of fact cannot base a conviction on conjecture and speculation and a verdict which is premised on suspicion will fail even under the limited scrutiny of appellate review.

Id. quoting *Commonwealth v. Smith*, 956 A.2d 1029, 1035-36 (Pa. Super. Ct. 2008)). See also *Commonwealth v. Wodjak*, 466 A.2d 991, 996 (Pa. 1983) (inferences must be reasonable and establish a prima facie case of criminal culpability; anything less would rise no higher than suspicion).

When reviewing a habeas petition, we look to the "last reasoned decision" of the state courts on the petitioner's claims. *Bond v. Beard*, 539 F.3d 256, 289-90 (3d Cir. 2008). Here, that "last reasoned decision" on Johnson's sufficiency of the evidence claim was the Superior Court's memorandum opinion on direct appeal. In affirming Johnson's convictions, the Superior Court relied on the following evidence as proof of Johnson's intent: (1) Johnson, Walker and Williams were seen arguing in the Midnight Special bar and were told to leave the premises on the night of the

murder; (2) they left the bar, with the victim walking between Walker and Johnson; (3) they proceeded to an alley and a shot was heard; (4) two individuals were seen running from the alley; and (5) the victim's body was discovered in the alley, along with a shotgun. Of course, the Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by relying on wholly circumstantial evidence. *Commonwealth v. Gibbs*, 981 A.2d 274, 281 (Pa. Super. Ct. 2009). However, Pennsylvania courts have instructed that when "applying the above test, the entire record must be evaluated and all evidence actually received must be considered." Id.

We find the record lacking in sufficient evidence to support the necessary conclusion that Johnson shared Walker's intent to murder Williams and that Johnson acted in a manner that

encouraged or facilitated the murder. Viewing, as we must, the evidence in the light most favorable to the Commonwealth, such evidence does not permit any reasonable fact finder to reasonably infer Johnson's specific intent to kill Williams.

Let us be clear about the findings of fact the record does and does not support. A trier of fact could reasonably infer from these facts that Johnson and Walker shared a common intent to confront, threaten or harass Williams, but the statute requires Johnson and Walker to have a shared intent to kill Williams. Perhaps it can be speculated from this record that Johnson shared Walker's intent to kill Williams, but we do not find it reasonable to infer an element of the offense based on mere speculation. Although such speculation may be possible, it is Constitutionally insufficient to support a conviction. See, e.g.,

Newman v. Metrish, 543 F.3d 793, 796 (6th Cir. 2008), cert denied sub nom. *Metrish v. Newman*, 130 S.Ct. 1134 (2010); *Parker v. Renico*, 506 F.3d 444, 452 (6th Cir. 2007) (distinguishing reasonable speculation from sufficient evidence in finding a state court's application of standard set forth in Jackson to be objectively unreasonable).

D.

We start with the argument in the bar on the night of the murder, mindful that a defendant's presence at the scene of the crime, mere knowledge of that crime or association with the criminal actor cannot be a basis for accomplice liability. *Commonwealth v. Murphy*, 844 A.2d 1228, 1238 (Pa. 2004). Gary Miller, the bar owner's son, did not recall Johnson being at the bar, but did recall the bar's doorman ordering Walker and the victim to leave the premises. Chambers, the doorman, recalls

ejecting Williams and Walker from the bar, but testified he did not see Johnson. The Commonwealth maintains that Johnson, Walker and the victim engaged in a heated argument at a local tavern on the night of the murder. The difficulty, however, is that the lone witness to this event -- Carla Brown -- testified only that she "*saw*" an argument and did not "hear" the contents of the discussion. Brown does not testify that Johnson spoke during this argument, and indeed, does not testify that Johnson was actively involved in the argument. She demonstrated various gestures she witnessed, but did not identify who made these gestures. Brown does not affirmatively identify Johnson as even participating in the argument. Indeed, Brown's testimony tells us nothing of Johnson's actions during this argument. Without knowing the content of the argument, and whether

Johnson was involved in it, Brown's testimony adds nothing on the question of intent; any inference drawn therefrom as to Johnson's intent to kill Williams would only be speculation.

Likewise, evidence that Johnson walked with Walker and the victim to an alley is not evidence of his specific intent to kill Williams. Brown, who also followed the three men out of the bar and down the street, testified that they walked in a "single file line." She testified that Johnson "never went in [to the alley]," but at another point in her testimony related that "they walked him in that alley." Later, in a summary of her testimony, she related that "all I know is who walked him [into] that alley and who stood in front of the alley." The Commonwealth relied on Brown's testimony that the victim was "walked" into the alley as evidence of Johnson's specific intent. If Brown had testified

that Johnson actively pushed, shoved, ordered or otherwise forced the victim into the alley, or prevented him from leaving it, it would be reasonable to infer Johnson's specific intent. Brown does not so testify, nor does her testimony reasonably permit any such inference. Any inference drawn from this testimony as to Johnson's specific intent to kill is an unreasonable one. Further, the Commonwealth relied on Brian Ramsey's opinion that Williams was "forced" into the alley as evidence of Johnson's intent. Reliance on Ramsey's testimony to establish intent is unreasonable. Brian Ramsey testified that he did not see the victim enter the alley and did not describe any physical action in his testimony that would lead to a reasonable inference that anyone "forced" the victim into the alley. Ramsey testified that

> I didn't see them go down the street with Taraja [Williams]. I saw, when I looked, Taraja was walking into the alley first, and there were two other people behind him, and one was -- stayed there by the sidewalk. But, like I said, I really only glanced, you know. And after I looked, I figured he was all right, so I just turned back around.

App. at 233. Ramsey also does not identify who "forced" the victim into the alley:

Q: Were these people walking down 14th Street in a line, were they like one after the other, or were they side by side, or how were they when you saw them at the alley?

A: When I saw these people, they were on Market Street.
Q: I'm sorry, Market Street.

A: I wouldn't really say. I would say they were just -- I looked, you know. One person was already -- Taraja had already walked into the alley. The second person was walking in behind him.

Q: So Taraja went in first?

A: Yes.

Q: Okay.

A: So to my -- I would say that he was forced in that alley.

Q: But all you saw is that he walked in there on his own?

A: Yes.

App. at 246. Ramsey contradicts himself. First he comments that the victim was forced into the alley, and then testifies that he only saw the victim walk into the alley. Although not mentioned as evidence by the Superior Court, the District Court accepted Ramsey's opinion that Williams was "forced" into the alley as fact. Here, the problem is that Ramsey's opinion is unsupported by his own testimony. Ramsey provided no facts to back up his opinion, nor did he identify who "forced" the victim into the alley. Without more, it is unreasonable to rely on this evidence to establish an inference that Johnson intended to kill Williams.[4]

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[4] The District Court opined that "Johnson completely ignored Brown's testimony that he walked Williams into the alley and Ramsey's testimony that Williams was forced into the alley.

The Commonwealth argues that Johnson's intent to kill can be reasonably inferred from the fact that he purposefully blocked the entrance to the alley. The District Court found this evidence to be an important inference to be drawn as to Johnson's specific intent. The difficulty is, however, that there is no record evidence indicating that Johnson blocked the entrance to this alley. There is no evidence that Williams, the victim, attempted to flee the alley and Johnson prevented him from doing so. All the evidence shows is that Johnson

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Further, in light of the multiple altercations with Williams that day, including the heated argument in the bar only moments before, it is certainly a rational inference that Johnson intentionally walked Williams toward the alley and the purposefully stood blocking the entrance." 541 F.Supp.2d at 674. The problem, however, is that the District Court misreads Brown's testimony. She did not testify that Johnson walked Williams into the alley or blocked his exit therefrom. Ramsey testified that the victim walked into the alley "on his own."

stopped walking at the entrance to the alley when the people he was following -- Walker and Williams -- entered it. Although one could speculate that Johnson stopped at the entrance to prevent Williams from escaping, such a picture of the night's events cannot be reasonably inferred from the evidence without engaging in the type of speculation prohibited by the Due Process clause.

The Superior Court lastly identified the fact that two men were seen fleeing the scene of the crime as evidence of Johnson's intent. Here, the Superior Court most likely was relying on the testimony of Aaron Dews. While working in a building bordering the alley where the murder took place, Dews heard a noise he originally thought was a furnace. After checking the furnace, Dews looked out a window and saw two people running up the driveway. He could not see anything more.

This is not evidence of Johnson's specific intent to commit murder. Dews cannot identify the people who ran down the driveway, he did not witness anyone going into the driveway, he could not identify Johnson as one of the individuals in the driveway -- indeed, he admitted that his view was obstructed by plastic sheeting on the window. It is not reasonable, therefore, to infer from Dews' testimony that Johnson was one of these individuals running in the driveway.

Moreover, that Johnson was in a car that fled from the police is not evidence of his intent to commit murder. Pennsylvania courts have held that flight from the scene of the crime may evidence a consciousness of guilt, "along with other proof, from which guilt may be inferred." Commonwealth v. Bruce, 717 A.2d 1033, 1037-38 (Pa. Super. Ct. 1998); see also Commonwealth v.

Moore, 937 A.2d 1062, 1067 (Pa. 2007). However, "this only holds true in cases in which the other evidence of guilt consists of more than mere presence at the scene." Commonwealth v. Hargrave, 745 A.2d 20, 24 (Pa. Super. Ct. 2000). The Pennsylvania Supreme Court has instructed that "mere presence on the scene both immediately prior to and subsequent to the commission of a crime and flight therefrom is not sufficient evidence to prove involvement in the crime." Commonwealth v. Goodman, 350 A.2d 810, 811-12 (Pa. 1976). "The additional element of flight, which is as consistent with fear as with guilt, does not convert presence into proof of guilt." Id. at 811.

Harrisburg police detective Kevin Duffin testified that, while on patrol in an unmarked police car, he encountered another vehicle containing three African-American males. Duffin

followed this vehicle until it hit another car and stopped. Duffin testified that the vehicle's occupants fled and that two of them were later apprehended C one of them was petitioner Johnson. Duffin, however, was not at the scene of the crime during this time, nor was Johnson fleeing the scene of the crime when he was apprehended approximately twelve hours later. Any inference that Johnson's flight from Duffin is evidence of his specific intent to kill is an unreasonable one. Although not specifically discussed, or indeed even mentioned by the Superior Court, the Commonwealth points to testimony concerning a debt that it argues was owed to Johnson by Williams as evidence of motive, which in turn, would reasonably permit a fact finder to infer Johnson's specific intent to aid and abet Williams' murder. The problem for the Commonwealth,

however, is that the state trial court specifically found that this debt was owed only to Walker, not to Johnson. Indeed, the prosecutor argued at the trial that the debt was owed only to Walker. Any inference drawn from this debt to establish Johnson's specific intent is unreasonable because it is foreclosed by the trial court's specific finding of fact that the debt was not owed to him. We accord a presumption of correctness to the state court's factual findings and the Commonwealth has presented nothing to overcome this presumption. See Lewis v. Horn, 581 F.3d 92, 100 (3d Cir. 2009); 28 U.S.C. ' 2254(e)(1).

The District Court implied that, taken separately, the pieces of evidence presented by the Commonwealth were insufficient to convict Johnson. 541 F.Supp.2d at 674-75. We agree. However, we must view each piece of evidence as if

it is connected to the whole and determine if the totality of the evidence, viewed in a light most favorable to the Commonwealth, establishes criminal intent beyond a reasonable doubt. We have done so and are convinced that the evidence produced here simply would not allow a reasonable juror to conclude beyond a reasonable doubt that Johnson intended to kill Williams. The web of evidence in this case is composed of strands of evidence that lead, more likely than not, to the conclusion that Johnson neither possessed the intent to kill Williams, nor assisted in the killing.

Nor is the evidence sufficient to support the necessary conclusion that Johnson acted in such a way that he intended to encourage, solicit, aid or facilitate Walker in killing Williams. See 18 Pa. Con. Stat. Ann. ' 306(c)(1)(i) and (ii). The evidence simply does not permit any reasonable factfinder to

find Johnson guilty on charges of aiding and abetting first degree murder as that crime is defined by Pennsylvania statute.

E.

To convict a defendant of conspiracy in Pennsylvania, the trier of fact must find three things from the evidence: "(1) the defendant intended to commit or aid in the commission of the criminal act; (2) the defendant entered into an agreement with another ... to engage in the crime; and (3) the defendant or one or more of the other co-conspirators committed an overt act in furtherance of the agreed upon crime." Commonwealth v. Montalvo, 956 A.2d 926, 932 (2008), cert. denied, B U.S. B, 129 S.Ct. 1989 (2009). First-degree murder requires the specific intent to kill, and that mens rea is also required of accomplices and co-conspirators. See 18 Pa. Con.

Stat. Ann. § 2502(a); Smith v. Horn, 120 F.3d 400, 410 (3d Cir. 1997), citing Commonwealth v. Huffman, 536 Pa. 196, 638 A.2d 961 (1994). Inasmuch as we have already determined that the Commonwealth failed to produce sufficient evidence to allow a rational jury to find specific intent to kill on the first-degree murder charge, it necessarily follows that they failed to do so on the conspiracy charge as well.

IV.

The Superior Court's decision on the merits of Johnson's sufficiency challenge was an erroneous application of Jackson. We must still determine, however, whether that court's decision was also "unreasonable" under AEDPA. We have undertaken a careful and detailed review of the evidence and have made an assessment of the evidence produced for each element of the offense

charged. We have determined that there was insufficient evidence to prove Johnson's specific intent to commit murder. The Superior Court unreasonably applied the standard governing when inferences may be relied upon to establish elements of a criminal offense beyond a reasonable doubt. That standard requires that the inference in question must be "more likely than not to flow" from the facts already established. Leary v. United States, 395 U.S. 6, 36 (1969). The Amore likely than not standard" is well established. It cannot be satisfied here because the record simply does not allow a reasonable juror to infer that Johnson intended to kill Williams. The District Court erred by concluding that the Superior Court's decision was a reasonable application of Supreme Court precedent to the facts of this case. The Superior Court relied on speculation and unreasonable

inferences when it reviewed the circumstantial evidence proffered by the Commonwealth against Johnson. Doing so was not only error, but was unreasonable because it allowed Johnson to be convicted on something less than proof of "every element of the offense" of conviction beyond a reasonable doubt. Jackson, 443 U.S. at 316.

V.

The Pennsylvania Superior Court's decision affirming Johnson's conviction was an unreasonable application of the Constitutional requirement that the Commonwealth present evidence sufficient to prove every element of a crime beyond a reasonable doubt. 28 U.S.C. § 2254(d)(1); In re Winship, 397 U.S. 358, 365-68 (1970); Jackson, 443 U.S. at 319.

Accordingly, for all the reasons we have set forth above, we will reverse the District Court's

order denying habeas relief and remand to that court with instructions for it to issue the writ.

Appendix B

CHAGARES, Circuit Judge, dissenting.

I agree with my learned colleagues' explanation of the legal standards in this case. However, I disagree with the majority's application of the law and I therefore respectfully dissent. I would affirm the District Court's denial of Lorenzo Johnson's petition for a writ of habeas corpus because the state courts' rejection of his sufficiency of the evidence claim was not contrary to, or an unreasonable application of, Jackson v. Virginia, 443 U.S. 307 (1979).

Viewing the evidence, as we must, in its totality and in the light most favorable to the Commonwealth, I believe the state court reasonably determined that a rational juror could infer that Johnson had a specific intent to aid Walker in murdering Taraja Williams. Weaving together the testimony of Carla Brown, Gary Miller, Jr., Victoria Doubs, Brian Ramsey, Detective Kevin Duffin, and Aaron Dews, the Commonwealth was able to paint the following picture. On the morning of December 14, 1995, Johnson and Walker, who were always together, woke up in the same house and went with Doubs to the Kentucky Fried Chicken ("KFC") near the intersection of 14th and Market Streets in Harrisburg, Pennsylvania. Per Doubs's testimony, Williams approached, and Walker went to confront him about the debt that he owed "us."[1]

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[1] 1 Emphasizing the ambiguity of Doubs's statement that Williams owed a debt to "us," Johnson argues that an inference that Williams owed a debt to Walker, Doubs, and Johnson (as

defiant, Williams told Walker that he would get the money when Williams felt like it and that he was not scared of Walker. A fight ensued, and Williams beat Walker with a broomstick. As a result – and in Johnson's presence – Walker was laughed at and embarrassed by his peers. In response, Walker furiously and repeatedly stated – again in Johnson's presence – that he intended to kill Williams. [2]

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opposed to only Walker and Doubs) was impermissible because the trial court made a finding that the debt was owed only to Walker. Because, he says, it was just as likely that Doubs's reference to "us" was to only herself and Walker, an inference that the debt was owed to Johnson as well is impermissible. The Commonwealth is ultimately correct in its argument, however, that the debate does not much matter: whether Williams owed money to all three or only to Doubs and Walker is beside the point because the testimony concerning the debt provided Johnson with knowledge of Walker's motive to kill Williams. Together with other evidence discussed in this opinion, I believe that it was reasonable for the state court to find that Johnson's intent to aid Walker can be inferred from his prior knowledge combined with his actions at the time of the murder.

2 Given this testimony, it is perplexing that Johnson can argue that "[e]ntirely missing from the Commonwealth's proof is any evidence that [he] knew that Walker planned to kill Williams in advance of it happening." Johnson Br. 24, 30-31. Quite to the contrary, the most logical inference

Upon returning to the area together later that evening, Brown saw Johnson, Walker, and Williams arguing in the Midnight Special bar. [3] After being thrown out of the bar, the three men proceeded in a single-file line down the street, with Walker in front, Williams in the middle, and Johnson in the rear. Walker was wearing a long, leather overcoat and noticeably walking like he had an object (presumably a shotgun) hidden in his overcoat. When they arrived at an alley between the buildings at 1420 and 1422 Market Street, Johnson stood outside the entrance while Walker, followed by Williams, entered the alley. There was testimony from both Brown and Ramsey that Williams did not willingly enter the alley. Upon entering the alley, Walker shot and killed Williams with a shotgun.

The aftermath of the crime is also consistent with Johnson's guilty mind. Aaron Dews testified that he saw two silhouettes running up the driveway from the direction of the alley. Although

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from Walker's statement (in Johnson's presence) that he planned to kill Williams is that Johnson knew very well that Walker had such intentions.

3 The majority posits that because Brown could not hear what was being said during the argument, no inferences may be drawn therefrom. I disagree. Certainly one may perceive individuals engaged in an argument without knowing the actual content of the argument.

he could not make out the silhouettes" gender, from other evidence it flows more likely than not that the running silhouettes were indeed Johnson and Walker. Brown testified that she passed the alley and upon hearing the gun shot ran up Market Street and cut through another alley to get to Regina Street. Although this is the general direction that the two silhouettes were running, Brown ran through a different alley. Since Williams had been killed and Brown had run through a different alley, a logical inference existed that Johnson and Walker were the "silhouettes" that Dews saw fleeing up the driveway between the buildings at 1420 and 1422 Market Street. Johnson also fled from Detective Duffin the very next afternoon. Finally, there was testimony from Doubs that Johnson's friend attempted to bribe her into giving false alibi information to Duffin on Johnson's behalf. All of this post-offense conduct further supports the reasonableness of the state court's ultimate determination. See Commonwealth v. Harvey, 526 A.2d 330, 334 (Pa. 1987) ("It is a well-settled rule of law that if a person has reason to know he is wanted in connection with a crime, and proceeds to flee or conceal himself from the law enforcement authorities, such evasive conduct is evidence of guilt and may form a basis, in connection with other proof, from which guilt may be inferred."); Commonwealth v. Tinsley, 350 A.2d 791, 792 (Pa. 1976) (same).

Johnson has never argued that Walker lacked a specific and premeditated intent to kill Williams. The only issue – whether phrased in terms of specific intent to commit first-degree murder or specific intent to aid in the commission

of first-degree murder – is Johnson's state of mind at the time of the homicide. Piecing together the constituent parts of the Commonwealth's evidence, I believe that the state court was not unreasonable in finding that a rational jury could properly infer Johnson's specific intent to aid Walker in the murder.

The majority is correct that although each strand of evidence need not support an inference of guilt by itself, we must consider each strand of evidence as if woven or entwined "to the whole and determine if the totality of the evidence, viewed in a light most favorable to the Commonwealth, establishes criminal intent beyond a reasonable doubt." Majority Op. 27. I believe, however, that the majority has improperly isolated certain strands of circumstantial evidence to reach its conclusion.

For instance, the majority holds that the mere fact that "Johnson walked with Walker and the victim to an alley" has no evidentiary value. Majority Op. 22. However, the testimony was that Walker, Williams, and Johnson proceeded in a single-file line down the street, with Walker in front (noticeably walking with an object concealed in his overcoat), Williams in the middle, and Johnson in the back. This, of course, occurred within hours of Johnson witnessing Williams beating Walker, resulting in embarrassment and humiliation to Walker, and Walker repeatedly stating that he intended to kill Williams. The single-file line brings to mind an "execution-style" killing, and undercuts any inference that the three might have been proceeding down the alley to do a

drug deal or for some other late-night jaunt. Moreover, the manner in which they proceeded down the street demonstrates, more likely than not, that Johnson knew what was coming and was aiding Walker in escorting him and the victim to the place of execution, especially given the fact that the shooting occurred immediately upon entering the alley. Finally, the coercive nature of the single-file line is corroborated by Brian Ramsey's testimony that Williams was "forced" in the alley. Johnson's participation in the escorting helps demonstrate concert between him and Walker. I believe the nature of the procession itself, in conjunction with other evidence, is helpful in demonstrating Johnson"s specific intent.

In addition, the majority discounts as speculation any inference that Johnson's presence at the entrance to the alley where Walker killed Williams demonstrated Johnson's intent. Taken in isolation, Johnson's mere presence at the scene of a crime cannot be a basis for accomplice liability. See Commonwealth v. Murphy, 844 A.2d 1228, 1238 (Pa. 2004). But in conjunction with other evidence, it was certainly reasonable for the state court to find that Johnson's presence outside the alley – taken together with the evidence of his prior knowledge of Walker's intent to kill Williams, the evidence that he had just participated in an argument with Williams, and the single-file procession to the alley – could be viewed by a rational juror as standing guard outside the alley while Walker consummated the murder.[4] See

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[4] whether there was a need for a lookout, or whether Johnson's effectiveness as one was only

Commonwealth v. Ulatoski, 371 A.2d 186, 190 (Pa. 1977) ("[E]vidence concerning the previous relations between a defendant and a homicide victim is relevant and admissible for the purpose of proving ill will, motive, or malice. Evidence of prior occurrences in which the accused threatened, assaulted, or quarreled with the decedent may be admissible for this purpose." (footnote omitted)). I submit that it was reasonable to conclude that Walker's stance outside the alley demonstrated

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slight, however, is not the point. See Murphy, 844 A.2d at 1234 ("There must be some additional evidence that the defendant intended to aid in the commission of the underlying crime, and then did or attempted to do so. With regard to the amount of aid, it need not be substantial so long as it was offered to the principal to assist him in committing or attempting to commit the crime."). In any event, Brown's testimony strongly implies that Johnson was standing outside of the alley not by happenstance, but with a specific purpose. See Joint Appendix ("JA") 200, 203 ("But one thing for sure, they walked him in that alley. . . . All I know is who walked him in that alley and who stood in front of the alley."). She also stated that she was scared that "they'd kill me too," further implying that Johnson and Walker were acting collectively. JA 168 (emphasis added). Given the other evidence, it seems perfectly reasonable for one to conclude more likely than not that Johnson"s not-so-fortuitous stance outside the alley was an overt attempt to aid in the crime.

both his specific intent to have Williams killed and his attempt to aid Walker in doing so.

* * * *

When considered in its totality, the evidence supports the inference that Johnson was assisting Walker in escorting Williams to the alley to be killed: a single-file procession, immediately followed by Johnson taking a position just outside the alley, immediately followed by the murder with a shotgun, immediately followed by Johnson and Walker fleeing from the scene. Together with the evidence concerning the trio's interactions outside the KFC and in the Midnight Special bar, I believe the ultimate inference – that Johnson acted with a specific intent to facilitate a first-degree murder – flows logically and reasonably from the evidence. Accordingly, I would hold that the state courts" rejection of Johnson"s sufficiency of the evidence claim was not contrary to, or an unreasonable application of, Jackson.[5]

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[5] Johnson did not advance separate arguments with regarding his criminal conspiracy conviction, although he did mention there was a lack of evidence "upon which a rational jury could have found that he possessed specific intent to kill, as required for the homicide or criminal conspiracy convictions." See Johnson Br. 4. Perhaps this was because "the „intent" element required to be proven by the Commonwealth is the same for accomplice liability as for conspiracy." Commonwealth v. Stein, 585 A.2d 1048, 1050 n.6 (Pa. Super. Ct. 1991). As a result, the above discussion applies equally to Johnson"s murder and conspiracy convictions.

For the above reasons, I respectfully dissent, and would affirm the judgment of the District Court.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2477

LORENZO JOHNSON,
Appellant

v.

NEAL MECHLING, SUPERINTENDENT;
COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 4-04-cv-01564)
District Judge: The Honorable John E. Jones, III

ARGUED SEPTEMBER 30, 2009
BEFORE: McKEE, Chief Judge, CHAGARES, and
NYGAARD, Circuit Judges.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on September 30, 2009.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the order of the said District Court entered on March 31, 2008, be, and the same is hereby reversed. This matter is remanded to that court with instructions for it to issue the writ. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/Marcia M. Waldron
Clerk

Date: October 4, 2011

Case: 08-2477 Document: 003110674642

Date Filed: 10/04/2011

RE: Lorenzo Johnson v. Neal Mechling

Case Number: 08-2477

District Case Number: 4-04-cv-01564

ENTRY OF JUDGMENT

Today, **October 04, 2011** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below. Time for Filing: 14 days after entry of judgment.45 days after entry of judgment in a civil case if the United States is a party. Page Limits: 15 pages Attachments: A copy of the panel's opinion and judgment only. No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. If separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to a combined 15 page limit. If only panel rehearing is sought, the Court's rules do not provide for the

subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied. A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed.R.App.P. 41. Review of this Court's final decision may be pursued in the Supreme Court of the United States.
Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,

Marcia M. Waldron, Clerk

By:

Lynn M. Lopez,
Deputy Clerk
267-299-4922

Case: 08-2477 Document: 003110674643 Page: 2

Date Filed: 10/04/2011

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

LORENZO JOHNSON, Petitioner	:	NO. 4: 04-cv-1564
v.	:	Judge John E. Jones III
NEAL MECHLING, et al. Respondents	:	

MEMORANDUM

March 31, 2008

This matter is before the Court on the petition of Lorenzo Johnson for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Johnson seeks relief from the life sentence imposed by the Court of Common Pleas of Dauphin County, Pennsylvania for his convictions of first degree murder and criminal conspiracy. For the reasons set forth below, the Court will deny the petition.

I. PROCEDURAL HISTORY

Johnson filed a pro se petition for writ of habeas corpus pursuant to § 2254 on July 19, 2004. [1] (Doc. 1.) Johnson filed a pro se memorandum of law in support of his petition on March 6, 2006. [2] (Doc. 20.) On July 24, 2006, counsel was appointed to represent Johnson. [3] (Doc. 25.) With the assistance of counsel, Johnson filed a supplemental memorandum in support of his petition on March 6, 2007. (Doc. 33.) Johnson also filed a motion for discovery (Doc. 34), which was granted, subject to *in camera* review (*see* Docs. 42, 45, 50, 53). The Respondents filed their response to Johnson's petition on December 24, 2007. (Doc. 64.) Johnson filed a reply brief in support of his petition on January 23, 2008. (Doc. 70.) The

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[1] Johnson initially filed a motion requesting an extension of time in which to file a § 2254 motion because the one-year statute of limitations for doing so under 28 U.S.C. § 2244(d)(1) was soon approaching, but the appeal of his second PCRA petition was still pending before the Pennsylvania Superior Court. *See* Case No. 4:04-mc-163 at Doc. 1. The Court ordered Johnson to file his petition and thereafter stayed the case pending the resolution of Johnson's state-court proceedings. *See id.* at Doc. 2.

[2] Johnson also filed a pro se "amended" memorandum on July 27, 2006. (Doc. 27.)

[3] The two-year delay was to allow Johnson the opportunity to pursue his second PCRA petition through the Pennsylvania courts. *See* n.1 *supra*; *see also* Docs. 6, 11-17, 22-23.

petition is now ripe for the Court's review.[4]

II. BACKGROUND

On March 17, 1997, following a three-day jury trial in the Dauphin County Court of Common Pleas, Lorenzo Johnson and co-defendant Corey Walker were found guilty of murder in the first degree and criminal conspiracy to commit murder. (Notes of Trial Testimony, *Commonwealth v. Johnson, et al.*, Nos. 1544 CD 1996 and 2739 CD 1996, Docs. 66-11 to 66-24 [hereinafter N.T.] at 428-29.) Johnson and Walker were both sentenced to mandatory life imprisonment on the murder conviction and concurrent five to ten years of imprisonment on the conspiracy conviction. (N.T.

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[4] In his reply brief, Johnson requests oral argument on the petition. The Court, however, finds that the petition may be decided based on the comprehensive submissions of the parties.

431-35.)

On March 27, 1997, Johnson's trial counsel filed a post-sentence motion with the trial court on the grounds that "the evidence presented at trial was insufficient to show that Lorenzo Johnson participated in the murder" and that "the verdict returned by the jury was against the weight of the evidence presented at trial, such that it tends to shock one's sense of justice." (Doc. 33-2 at 23, 24.)[5] The motion did not cite to any case law. Relying only on Pennsylvania law, the Court of Common Pleas denied Johnson's post-sentence motion by order of August 25, 1997. (*Id.* at 27.)

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[5] Unless otherwise noted, citations to page numbers are to the indicated pages of the ECF documents filed with this Court.

On April 30, 1998, Johnson, still represented by trial counsel, filed a direct appeal to the Pennsylvania Superior Court, again arguing that the evidence adduced at trial was insufficient as a matter of law to sustain a guilty verdict and that the verdict was against the weight of evidence. (*Id.* at 34, 41.) Johnson cited only to Pennsylvania law governing these issues. (*Id.* at 38-39, 47.) On September 28, 1998, the Superior Court affirmed Johnson's and Walker's conviction and sentence. (Doc. 64-6 at 1.) In doing so, the Superior Court applied only Pennsylvania law. (*Id.* at 5-8.) One judge of the court filed a separate opinion concurring with portion of the decision affirming Walker's convictions, but dissenting from the portion affirming Johnson's convictions. (*Id.* at 9-10.) This judge did not further elaborate on the reasons for his separate opinion.

Johnson filed a petition for allowance of

appeal with the Pennsylvania Supreme Court, again arguing that the evidence was insufficient to support his convictions and that the verdict was against the weight of the evidence. (Doc. 647.) The petition cited no supporting legal authority. On February 26, 1999, the Pennsylvania Supreme Court denied the petition. (Doc. 64-8.)

On December 1, 1999, Johnson filed a pro se petition for relief under Pennsylvania's Post Conviction Relief Act ("PCRA"). (Docs. 66-2, 66-3.) After the appointment of counsel to represent Johnson, an amended PCRA petition was filed on March 21, 2000. (Doc. 64-9.) The amended petition raised several grounds for relief. Johnson argued that the failure of the Commonwealth to disclose the existence of a plea agreement with witness Victoria Doubs violated the due process guarantees of the Pennsylvania and United States Constitutions. (*Id.* at 15.) Johnson also argued

that he was denied the right to counsel guaranteed by the Pennsylvania and United States Constitutions because his trial counsel provided ineffective assistance by (i) failing to object to the trial court's jury instructions and request a standard jury instructions on inconsistent statements and witness credibility; (ii) failing to object to the hearsay testimony; (iii) failing to call Adrian Fluellen to testify; (iv) failing to call Larry Pates to testify; (v) failing to object to a certain remark in the prosecutor's closing argument; and (vi) improperly persuading Johnson not to testify.

Following an evidentiary hearing, the Court of Common Pleas denied each of Johnson's claims on the merits by order of April 29, 2002. (Doc. 33-2 at 74.) Johnson appealed to the Superior Court, reasserting the same grounds for relief. (Doc. 66-4, 66-5.) By order of July 17, 2003, the Superior Court affirmed the denial of Johnson's

PCRA petition. (Doc. 33-2 at 93.) The court first found that Johnson's due process claim had not been raised on direct appeal, and therefore was not preserved for PCRA review and was waived. The Superior Court adopted the trial court's merits analysis in rejecting Johnson's other claims. Johnson filed a petition for allowance of appeal with the Pennsylvania Supreme Court (Doc. 66-9), which the Court denied on April 2, 2004 (Doc. 64-12).[6]

III. STANDARD OF REVIEW

Title 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat.

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[6] Johnson also filed a second PCRA petition on May 20, 2002, raising a claim of after-discovered evidence. This petition was dismissed without a hearing on May 26, 2004, and dismissal was affirmed by the Superior Court on June 15, 2006. Johnson did not seek review in the Pennsylvania Supreme Court. The issues raised by Johnson's second PCRA petition are not relevant to the claims raised in the current petition.

1214 (1996), provides the standards for federal courts reviewing state court judgments challenged by petitions for writ of habeas corpus.

Before a federal court may review the merits of a § 2254 petition, the petitioner must demonstrate exhaustion of state court remedies and lack of procedural default. Section 2254(b) provides that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State ... if he has the right under the law of the State to raise, by any

available procedure, the question presented." 28 U.S.C. § 2254(c). To exhaust available state court remedies, a petitioner must "fairly present" his claim through one complete round of the state's established appellate review process in order to give the state courts one full opportunity to resolve any constitutional issues.[7] *Nara v. Frank*, 488 F.3d 187, 197 (3d Cir. 2007).

If a petitioner fails to fairly present a claim to the state courts, and state procedural rules bar him from now doing so, the exhaustion requirement

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[7] On May 9, 2000, the Pennsylvania Supreme Court issued Order No. 218 which declares that federal habeas petitioners do not have to appeal to the Pennsylvania Supreme Court to satisfy the exhaustion requirement. The Third Circuit has recognized the validity of this Order, *see Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004), *cert. denied*, 544 U.S. 1063 (2005), and therefore a federal petitioner under custody pursuant to the judgment of a Pennsylvania court need only appeal to the Pennsylvania Superior Court to exhaust available state remedies.

is satisfied because there is literally "an absence of available State corrective process" under 28 U.S.C. § 2254(b). *Whitney v. Horn*, 280 F.3d 240, 252-53 (3d Cir. 2002). In such a case, however, the petitioner has procedurally defaulted his claim, and federal courts may not consider the merits of such a claim unless the petitioner establishes "cause and prejudice" or a "fundamental miscarriage of justice" to excuse the default. *Id.* Even when a petitioner properly exhausts a claim, a federal court may not review it on the merits if a state court's decision rests on a violation of a state procedural rule that is independent of the federal question presented and adequate to support the judgment. *Id.*; *Leyva v. Williams*, 504 F.3d 357, 365-66 (3d Cir. 2007).

If the petitioner has exhausted available

state remedies and the claims raised in the petition are not in procedural default, a federal court may reach the merits of the petition. The federal court's review, however, is limited by the deference owed to the state courts' decisions on the merits. Section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The "contrary to" or "unreasonable

application" of federal law standard of review mandated by § 2254(d)(1) requires a three-step process. *See Outten v. Kearney*, 464 F.3d 401, 413 (3d Cir. 2006). First, the court must identify the "clearly established Federal law, as determined by the Supreme Court of the United States" applicable to the petitioner's claims. *Williams v. Taylor*, 529 U.S. 362, 389-91 (2000); *Outten*, 464 F.3d at 414. "That statutory phrase refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412.

Next, the court must determine whether the state-court decision was "contrary to" the identified federal law. *Outten*, 464 F.3d at 413. A state-court decision is contrary to federal law if the state court

applies a rule that contradicts the governing law set forth in Supreme Court cases or if the state court confronts a set of facts that are materially indistinguishable from a Supreme Court decision and nevertheless arrives at a different result. *Williams*, 529 U.S. at 405-06. A state-court decision is not "contrary to" federal law merely because the federal court considering the prisoner's habeas application might reach a different result. *Id.* at 406. To satisfy § 2254(d)(1), the state-court decision must have been "substantially different" from the relevant Supreme Court precedent. *Id.* at 405. "It is not sufficient for [the petitioner] to show merely that his interpretation of Supreme Court precedent is more plausible than the state court's; rather,

[the petitioner] must demonstrate that Supreme Court precedent requires the contrary outcome." *Outten*, 464 F.3d at 413 (citations omitted).

If the state court decision is not "contrary to" Supreme Court precedent, the court must then determine if the decision was based on an "unreasonable application of" such precedent. *Id.* at 413-14. A state-court decision involves an "unreasonable application" of federal law if the state court identifies the correct governing legal rule from Supreme Court cases but unreasonably applies it to the facts of the particular state prisoner's case. *Williams*, 529 U.S. at 407-08. A state-court decision also involves an "unreasonable application" of federal law if it either unreasonably extends a legal principle from

Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *See id.* at 408-09; *see also Outten*, 464 F.3d at 413. "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. Importantly, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law. *Id.* at 410. The court is "not authorized to grant habeas corpus relief simply because we disagree with the state court's decision or because we would have reached a different result if left to our own devices. Instead,

the state court's application of Supreme Court precedent must have been objectively unreasonable, that is, the federal habeas court should not grant the petition unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Id.* at 414.

A federal court may also grant relief under § 2254(d)(2), where the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." As under § 2254(d)(1), the test here is objective unreasonableness. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (citing *Williams*, 529 U.S. at 399). The federal court, however, must also give deference to state court factual findings. Section 2254(e)(1) provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

The relationship between § 254(d)(2) and § 2254(e)(1) is somewhat unclear. *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004), *cert. denied*, 544 U.S. 1063 (2005). Both provisions are "generally indicative of the deference AEDPA requires of state court factual determinations," but each addresses a slightly different inquiry. *Id.* Section 2254(d)(2) addresses challenges to a state court's decision based on the evidence presented in the state proceedings. *Miller-El*, 537 U.S. at 340; *Lambert*, 387 F.3d at 235. That section requires the federal habeas court to decide whether the state court's determination was reasonable or unreasonable given the totality of the evidence presented. *Miller-El*, 537 U.S. at 340; *Lambert*, 387 F.3d at 235. Section 2254(e)(1), on the other

hand, addresses challenges to the state court's individual factual determinations, rather than the decisions based on those determinations. *Miller-El*, 537 U.S. at 341; *Lambert*, 387 F.3d at 235. Where a petitioner attacks specific factual determinations of the state court that are subsidiary to the ultimate decision, § 2254(e)(1) requires that the state court's determinations be afforded a presumption of correctness that the petitioner can rebut only by clear and convincing evidence. *Lambert*, 387 F.3d at 235. In sum, a federal habeas court reviews the facts found by a state court under § 2254(e)(1), but the legal decision based on those facts under § 2254(d)(2). *Miller-El*, 537 U.S. at 341; *Lambert*, 387 F.3d at 235-36.

Finally, "by its own terms § 2254(d) applies only to claims already 'adjudicated on the merits in State court proceedings.' It follows that when, although properly preserved by the defendant, the state court has not reached the merits of a claim thereafter presented to a federal habeas court, the deferential standards provided by AEDPA ... do not apply." *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). Instead, "the federal habeas court must conduct a de novo review over pure legal questions and mixed questions of law and fact, as a court would have done prior to the enactment of AEDPA. However, the state court's factual determinations are still presumed to be correct, rebuttable upon a showing of clear and convincing evidence." *Id.*

IV. DISCUSSION

Johnson's petition advances three grounds for relief: (1) the evidence presented at trial was insufficient to support his convictions in violation of due process, (2) the prosecutor committed a *Brady* violation by failing to reveal a plea agreement between the government and witness Victoria Doubs, and (3) trial counsel was ineffective for failing to request appropriate jury instructions on witness credibility and inconsistent statements.[8]

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[8] Johnson's pro se petition raised eight grounds for relief. Four of these grounds are encompassed in the claims advanced in his submissions prepared by counsel (Johnson's pro se petition split his current ineffective assistance claim into two separate grounds). The Court construes Johnson's submissions as having abandoned all but the claims presented in the briefs prepared with the assistance of counsel, during the process of winnowing out weaker arguments and focusing on those most likely to prevail. *See Smith v. Murray*, 477 U.S. 527, 536 (1986); *Jones v. Barnes*, 463 U.S. 745, 751-752 (1983); *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996); *see also United States v. Essig*, 10 F.3d 968, 973 (3d Cir.1993) (observing that a court is generally not required to review a counseled defendant's pro se arguments).

Respondents argue that Johnson's first and second claims are procedurally defaulted and, in the alternative, that all of his claims fail on the merits. The Court will address each of Johnson's claims in turn.

A. Sufficiency of the Evidence Claim

Johnson first argues that his convictions violated due process because the Commonwealth did not present sufficient evidence to prove his guilt as to each element of the crimes charged beyond a reasonable doubt. The Respondents contend that Johnson's sufficiency of the evidence claim is procedurally defaulted, and alternatively, that the claim fails on the merits. For the reasons that follow, the Court holds that Johnson has not procedurally defaulted this claim, but that the evidence presented at trial is sufficient to sustain his convictions.

1. Procedural Default

Respondents first argue that Johnson's sufficiency of the evidence claim was not fairly presented to the state courts because it was presented only as a claim based on state, not federal law. Respondents contend that a "rule of explicitness" derived from Supreme Court precedent requires a petitioner to explicitly communicate the federal nature of a claim to the state courts. Because Johnson would now be procedurally barred from explicitly raising a federal due process claim before Pennsylvania courts, the Respondents conclude that Johnson has procedurally defaulted his claim. Johnson counters that his sufficiency of the evidence claim was fairly presented because the standard for deciding such a claim under Pennsylvania and federal law is the

same. While the law addressing the issue presented by the parties is less than clear, the Court finds that Johnson has the better argument.

The principle of federal-state comity has long required a state prisoner to give the state courts an initial opportunity to pass upon and correct alleged violations of federal rights before a federal court will entertain his habeas petition. *See Picard v. Connor*, 404 U.S. 270, 275 (1971). The Supreme Court has emphasized that to exhaust available state remedies "the federal claim must be fairly presented to the state courts.... Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts." *Id.* at 275-76 (citations omitted). In *Picard*, before the state courts, the petitioner

argued that his indictment was invalid under state law. On appeal of the denial of his habeas petition, the court of appeals held that the indictment violated equal protection. The Supreme Court reversed, holding that the petitioner had not exhausted his state remedies because the state courts were not provided "with an opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim." *Id.* at 277. The Supreme Court stated:

> The [Massachusetts] Supreme Judicial Court dealt with the arguments respondent offered; we cannot fault that court for failing also to consider *sua sponte* whether the indictment procedure denied respondent equal protection of the laws. *Obviously there are instances in which the ultimate question for disposition will be the same despite variations in the legal theory* or factual allegations urged in its support. A ready example is a

> challenge to a confession predicated upon psychological as well as physical coercion. *Hence, we do not imply that respondent could have raised the equal protection claim only by citing book and verse on the federal constitution.* We simply hold that the *substance* of a federal habeas corpus claim must first be presented to the state courts. The claim that an indictment is invalid is not the *substantial equivalent* of a claim that it results in an unconstitutional discrimination.

Id. at 277-78 (citations omitted) (emphasis added).

The Supreme Court again addressed the fair presentation rule in per curiam opinion in *Anderson v. Harless*, 459 U.S. 4 (1982). In that case, the petitioner was convicted of two counts of first degree murder and sentenced to life imprisonment. Before Michigan courts, the petitioner argued that the trial court's jury instruction on malice was "erroneous" and in

support of that argument relied on *People v. Martin*, 221 N.W.2d 336 (Mich. 1974), "a decision predicated solely on state law in which no federal issues were decided, but in which the defendant had argued broadly that failure to properly instruct a jury violated the Sixth and Fourteenth Amendments." *Id.* at 6. Michigan courts affirmed the conviction, and "[n]ot surprisingly ... interpreted [the petitioner's] claim as being predicated on the state-law rule of *Martin*, and analyzed it accordingly." *Id.* at 7. On federal habeas review, the petitioner relied primarily on *Sandstrom v. Montana*, 442 U.S. 510 (1979) in arguing that the malice instruction had unconstitutionally shifted the burden of proof to him at trial. The district court held that the

petitioner had exhausted state remedies, and the court of appeals affirmed, holding that the "due process ramifications" of the petitioner's argument to the Michigan courts were "self-evident" and the petitioner's reliance on *Martin* sufficiently presented the substance of his federal claim. *Id.*

The Supreme Court reversed. The Court held that in fairly presenting a claim to state courts, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made" but rather, "the habeas petitioner must have fairly presented to the state courts the *substance* of his federal habeas corpus claim." *Id.* at 6 (emphasis added). The Court held that the *Sandstrom* rationale relied on by the federal courts in granting

the habeas petition had not been presented to the state courts, and that reliance on *Martin* was not sufficient to do so because the broad federal due process claim asserted by the defendant in *Martin* was not the same as the particular claim based on *Sandstrom* asserted by the petitioner. *Id.* at 7.

The contours of the fair presentation rule were thoroughly explored by the Third Circuit in *Evans v. Court of Common Pleas*, 959 F.2d 1227 (3d Cir. 1992) *cert. denied*, 506 U.S. 1089 (1993), a case which involved facts similar to those presented here. In that case, the petitioner Evans was convicted of third-degree murder in the Delaware County Court of Common Pleas. On appeal to the Pennsylvania Superior Court, she challenged "the evidence as insufficient to refute

[her] claim of self-defense or to prove malice." *Id.* at 1230 n.4. The Superior Court found the evidence sufficient to support the conviction. In her petition for allocatur to the Pennsylvania Supreme Court, Evans challenged "the evidence as insufficient to prove Third Degree Murder and to refute self-defense, in violation of the U.S. Constitution's Due Process Clause." *Id.* The Pennsylvania Supreme Court denied the petition. Evans then filed a habeas petition, arguing that the insufficiency of the evidence violated her due process rights under the Fourteenth Amendment. The district court held that Evans had failed to exhaust her state court remedies as to this claim because she did not claim constitutional error until her petition for allocatur to the

Pennsylvania Supreme Court.

On appeal, the Third Circuit found that Evans had fairly presented her claim to the Pennsylvania courts. The court stated that fairly presenting a federal claim to the state courts "requires that the claim brought in federal court be the substantial equivalent of that presented to the state courts. Both the legal theory and the facts underpinning the federal claim must have been presented to the state courts, and the same method of legal analysis must be available to the state court as will be employed in the federal court." *Id.* at 1231 (citations omitted). The court acknowledged that Pennsylvania courts had addressed Evans' claim only under state law. *Id.* Nonetheless, the court cited its own cases and

those of other courts of appeals which "look to the substance of the claim presented to the state courts, rather than its technical designation" in determining whether a federal claim has been fairly presented *Id.*

The Third Circuit first relied on *Bisaccia v. Attorney General of the State of New Jersey*, 623 F.3d 307 (3d Cir.), *cert. denied*, 449 U.S. 1042 (1980), in which the court held that a petitioner's state appeal and habeas petition "were similar enough to satisfy the requirements for exhaustion" of his due process claim because "[t]he petitioner's state claim ... had led the New Jersey Supreme Court into a method of analysis consistent with Fourteenth Amendment due process determinations." *Id.* The court

"concluded that because the substance of the appellant's state claim is *virtually indistinguishable* from the due process allegation now before the federal court, and because the method of analysis is *indistinct*, exhaustion of state remedies has been met." *Id.* (emphasis added).

The Third Circuit also cited with approval the analysis of *Daye v. Attorney General of New York*, 696 F.2d 186 (2d Cir. 1982) (en banc), where the court "noted that the ways in which a state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing chapter and verse of the Constitution", including:

> (a) reliance on pertinent federal cases employing constitutional analysis, (b)

> reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Id. at 1231-32 (quoting *Daye*, 696 F.2d at 194.)

Next, the *Evans* court relied on *Nadworny v. Fair*, 872 F.2d 1093 (1st Cir. 1989), where the court held that a state prisoner had fairly presented his federal insufficiency of the evidence claim, despite his failure to state explicitly the federal nature of his claim or cite federal precedent in his state court papers. *Id.* at 1232. The *Nadworny* court held that although "substantive deviations between superficially similar federal and state claims often exist, if an individual's claim, arising under and asserted in terms of state law, is *functionally*

identical – a point of more than trifling concern – to the federal claim, we must regard the federal claim as fairly presented." *Id.* (quoting *Nadworny*, 872 F.2d at 1099-1100) (emphasis added). The Third Circuit noted that in *Nadworny*, it was relevant that the test for reviewing sufficiency of the evidence is essentially identical under Massachusetts law as under the federal Constitution. *Id.*

Finally, the *Evans* court relied on *Tamapua v. Shimoda*, 796 F.2d 261 (9th Cir. 1986), where the Ninth Circuit concluded that the petitioner had exhausted his federal due process claim based on because "[s]ufficiency of evidence to convict is a fundamental concern of the due process clause. Therefore, petitioner's failure to invoke the

talismanic phrase 'due process of law' in the state proceedings was not fatal to his claim for habeas relief." *Id.* (quoting *Tamapua*, 796 F.2d at 263.)

Based on its analysis of these cases, the Third Circuit held that Evans had fairly presented her insufficiency of the evidence claim to the Pennsylvania courts. First, the court concluded that "the test for insufficiency of the evidence is the same under both Pennsylvania and federal law" and "[a]s such, the method of analysis asserted in the federal courts was readily available to the state courts." *Id.* at 1232-33. The court also concluded that Evans' insufficiency of the evidence claim qualified as an "assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution" because "the

Supreme Court's holding in *Jackson v. Virginia* that a challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilty beyond a reasonable doubt states a constitutional claim, established that *an insufficiency of the evidence claim necessarily implicates federal due process rights.*" *Id.* at 1233 (citation omitted) (emphasis added).

The Supreme Court again addressed the fair presentation rule in its per curiam opinion in *Duncan v. Henry*, 513 U.S. 364 (1995). In that case, the petitioner was convicted of sexual molestation. At trial, the petitioner objected, under the California evidence code, to testimony by the parent of another child who claimed to have been

molested 20 years previously. On direct appeal, he argued that the evidentiary error was a "miscarriage of justice" under the California Constitution. The California Court of Appeal found the error harmless and affirmed the conviction. Petitioner's habeas petition argued that the evidentiary error amounted to a denial of due process under the United States Constitution. The district court granted the petition and the Ninth Circuit affirmed, holding that the petitioner had exhausted his federal due process claim because "it is not necessary to invoke 'the talismanic phrase "due process of law"' or cite 'book and verse on the federal constitution.'" *Id.* at 888 (quoting *Henry v. Estelle*, 33 F.3d 1037, 1040 (9th Cir. 1994)).[9]

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[9] This language from the Ninth Circuit's opinion derives from *Tamapua v. Shimoda*, 796 F.2d 261 (9th Cir.1986), which, as discussed above, the Third Circuit

The Supreme Court reversed, holding that the petitioner had not fairly presented his federal claim. The Court stated:

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Id. at 365-66. The Court noted that the state court, when presented with a claim of error under the California evidence code, understandably confined its analysis to the application of state law by asking whether the prejudicial effect of the testimony outweighed its probative value, not whether it was so inflammatory as to prevent the fair trial

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relied on in its *Evans* opinion. *Compare Henry*, 33 F.3d at 1040 (quoting *Tamapua*, 796 F.2d at 262-63) *with Evans*, 959 F.2d at 1232 (same).

guaranteed by the Fourteenth Amendment. *Id.* at 366. The Court noted that "those standards are no more than 'somewhat similar,' not 'virtually identical'", and "[b]oth *Picard* and *Harless* emphasized that mere similarity of claims is insufficient to exhaust." *Id.* (citations omitted).

The Third Circuit addressed the impact of *Duncan* in *McCandless v. Vaughn*, 172 F.3d 255 (3d Cir. 1999). There, the court stated:

> We read *Duncan* as reaffirming the teaching of *Harless* and *Picard* that the absence of explicit reference to federal law does not resolve the issue of whether a federal claim was fairly presented. It also reaffirms, however, that petitioners must have communicated to the state courts in some way that they were asserting a claim predicated on federal law.

Id. at 261. The court also restated the four examples identified in the *Daye* decision of ways in which a petitioner may communicate the assertion

of a federal claim without explicitly referencing the federal constitution or statutes. *Id.* at 26162 (citing *Evans*, 959 F.2d at 1232 (quoting *Daye*, 696 F.2d at 194)). In *McCandless*, the court found that petitioner had not exhausted two of his federal due process claims because, like the petitioner in *Duncan*, he had presented these claims to the state courts only as evidentiary errors which required a different analysis than due process claims. *Id.* at 262.

The Supreme Court most recently addressed the fair presentation rule in *Baldwin v. Reese*, 541 U.S. 27 (2004). In that case, the petitioner appealed his kidnaping and attempted sodomy convictions through the Oregon courts and then sought collateral review in the state courts. After being denied relief, the petitioner sought review by the Oregon Supreme Court. In his petition to that court, the petitioner argued that both his trial and

appellate counsel had provided ineffective assistance. He specified that trial counsel's conduct violated the federal constitution, but did not state that his appellate counsel violated federal law. After the Oregon Supreme Court denied review, the petitioner asserted in his habeas petition that both trial and appellate counsel's ineffective assistance violated the federal constitution. The district court found that petitioner had not fairly presented his claim as to appellate counsel because his submissions to the state courts had not indicated that he was complaining about a violation of federal law as to appellate counsel. The Ninth Circuit reversed, holding that, although the petitioner's submissions did not alert the Oregon Supreme Court to the federal nature of his claim, that court would have realized the claim rested on federal law had they read the opinion of the lower state court.

The Supreme Court reversed, holding that "ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Id.* at 32. In rejecting a rule that would require state appellate courts to read lower court opinions, the Court stated:

> Finally, we do not find such a requirement necessary to avoid imposing unreasonable procedural burdens upon state prisoners who may eventually seek habeas corpus. A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal."

Id. The petitioner argued that his petition to the Oregon Supreme Court did, in fact, fairly present his federal claim because the Oregon and federal standards for deciding ineffective assistance claims are identical and therefore by presenting a state-law claim he necessarily presented the corresponding federal claim. *Id.* at 33. The Supreme Court, however, declined to address this argument because the petitioner had not raised the argument before the court of appeals.[10] *Id.* at 34.

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[10] Similarly, in *Howell v. Mississippi*, 543 U.S. 440 (2005), a state court defendant seeking a writ of certiorari to the Mississippi Supreme Court argued that he had presented a federal claim to the state courts for purposes of jurisdiction under 28 U.S.C.§ 1257(a) because his state and federal claims were "virtually identical." The Supreme Court, "[a]ssuming, without deciding, that identical standards might overcome a petitioner's failure to identify his claim as federal," held that the petitioner's state and federal claims were, in fact, not identical, and therefore dismissed the writ of

In *Nara v. Frank*, 488 F.3d 187 (3d Cir. 2007), the Third Circuit confirmed the continuing validity of the *McCandless* analysis in light *Baldwin*.[11] In *Nara*, the petitioner pled guilty to first-degree murder in the Fayette County Court of Common Pleas and did not appeal to the Pennsylvania Superior Court. The petitioner filed several PCRA petitions, arguing that he was mentally incompetent when he pled guilty. The Commonwealth argued that the petitioner had not exhausted his state remedies

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certiorari as improvidently granted. *Id.* at 444-45.

[11]Although *McCandless* merely reaffirmed the Third Circuit's decision in *Evans*, the parties and the court in *Nara* referred to the analysis of those cases as the "*McCandless* analysis." *See, e.g.*, *Nara*, 488 F.3d at 198 n.17. For the sake of convenience and consistency, we will also refer to the *McCandless* analysis, but such reference should be understood to encompass the holdings in both *McCandless* and *Evans*.

with regard to his federal incompetency claim. The third Circuit rejected this argument, holding that the Pennsylvania and federal standards for determining competency to enter a guilty plea are the same and that the petitioner had "repeatedly stat[ed] his claim 'in terms so particular as to call to mind a specific right protected by the Constitution.'" *Id.* at 198-99 (quoting *McCandless*, 172 F.3d at 260). The court further noted that the petitioner had "consistently presented the basic factual outline of a federal claim" and had not required the state courts "to search beyond the pleadings and briefs for a federal issue." *Id.* at 199.

In the margin, the Third Circuit rejected the Commonwealth's argument that "the Supreme

Court's decision in *Baldwin v. Reese* may have limited the viability of the *McCandless* analysis" by stating:

> *Baldwin* held that, "ordinarily a state prisoner does not fairly present a claim to a state court if that court must look beyond a petition or a brief (or similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion, that does so." *Baldwin*, 541 U.S. 27, 32 (2004). *Baldwin* concluded that the petitioner's briefs to the state courts in that case did not "fairly present" a federal claim because the briefs cited no case that might alert the state court to the federal nature of the claim, lacked a factual description supporting the claim, and yet cited federal law in support of other claims. *Id.* at 33. These are among the same considerations set out in *McCandless*.

Id. at 198 n.17; *see also Tome v. Stickman*, 167 Fed. Appx. 320, 324 (3d Cir. 2006) (stating "*Baldwin* left

open the possibility that if a petitioner presents a state claim that state courts evaluate under a standard identical to the federal standard, then presentation of that claim might be sufficient to meet § 2254(b)'s exhaustion requirements" but finding that claims presented in that case were not identical). The Commonwealth advanced this argument again in moving to stay the mandate of the Third Circuit pending its filing of a petition for writ of certiorari, but the court rejected the argument again for the same reasons.[12] *See Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007).

This long and winding road of Supreme Court and Third Circuit precedent leads to several conclusions about when a habeas petitioner has

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[12] The Commonwealth filed a petition for writ of certiorari on November 9, 2007, which remains pending as of the date of this Order. *See Lawler v. Nara*, No. 07-733 (U.S. Sup. Ct.).

"fairly presented" a federal claim to state courts. First, a petitioner fairly presents a federal claim when he explicitly identifies before the state courts the federal source of law in which his claim is grounded. *Baldwin*, 541 U.S. at 32; *Duncan*, 513 U.S. at 365-66. For example, a petitioner could explicitly reference the particular provision of the Federal Constitution on which his claim is based. Second, a petitioner fairly presents a federal claim in his submissions to the state courts by relying on state or federal cases deciding his claim on federal grounds. *Baldwin*, 541 U.S. at 32; *McCandless*, 172 F.3d at 261; *Evans*, 959 F.2d at 1232; *Daye*, 696 F.2d at 194. For example, while not referencing a particular constitutional provision, a petitioner

could rely on a case that analyzed his claim under federal law. Third, a petitioner fairly presents a federal claim when he presents the factual and legal substance of that claim to the state courts. *Picard*, 404 U.S. at 278; *Harless*, 459 U.S. at 6; *Evans*, 959 F.2d at 1231; *Daye*, 696 F.2d at 194. For example, although not explicitly referencing a particular constitutional provision or relying on a case decided on federal grounds, a petitioner could expressly assert the terms of a specific right protected by the Constitution or undertake the particular analysis required to assert a violation of that right.[13]

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[13]Somewhat suspect in light of the Supreme Court's decisions in *Harless* and *Duncan* is the statement from *Daye*, echoed in *McCandless* and *Evans*, that a petitioner may fairly present a federal claim to state courts through "allegation of a

Application of these concepts to the case at hand demonstrates that Johnson fairly presented his sufficiency of the evidence claim to the Pennsylvania courts. As an initial matter, both the Supreme Court and the third Circuit have explicitly rejected the Respondents' proposed "rule of explicitness." *See, e.g., Picard,* 404 U.S. at 278 (stating "we do not imply that respondent could have raised the equal protection claim only by citing book and verse on the federal constitution"); *McCandless*, 172 F.3d at 261 ("We read *Duncan* as

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pattern of facts that is well within the mainstream of constitutional litigation." *Daye*, 696 F.2d at 194. Although such presentment is somewhat analogous to presenting the "substance" of a claim to the state courts, this statement seems closer to the "self-evident" standard rejected in *Harless*, 459 U.S. at 7, and the "fundamental concern" language from the Ninth Circuit's decision in *Tamapua* which was rejected in *Duncan*, 513 U.S. at 887-88. Further, this statement seems inconsistent with the requirement of *McCandless*, *Evans*, and Supreme Court precedent that a petitioner present not only the factual but also the legal basis for a federal claim to the state courts. *See, e.g., Harless*, 459 U.S. at 6 ("It is not enough that all the facts necessary to support the federal claim were before the state courts...."); *McCandless*, 172 F.3d at 261; *Evans*, 959 F.2d at 1231.

reaffirming the teaching of *Harless* and *Picard* that the absence of explicit reference to federal law does not resolve the issue of whether a federal claim was fairly presented."); *Evans*, 959 F.2d at 1231 (noting some of the "ways in which a state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing chapter and verse of the Constitution").

Although Johnson did not label his claim as federal or rely on federal precedent, the "substance" of his sufficiency of the evidence claim was presented to the Pennsylvania courts. As noted in *Evans*, the test for sufficiency of evidence is the same under both Pennsylvania and federal law. 959 F.2d at 1232. The standard applied by the Pennsylvania courts in evaluating Johnson's sufficiency of the evidence claim was:

> [T]he court must view all of the

> **evidence admitted at trial in the light most favorable to the Commonwealth as verdict winner and draw all reasonable inferences in favor of the Commonwealth. The court must then determine whether the evidence was sufficient to permit the trier of fact to find each and every element of the crimes charged was established beyond a reasonable doubt. It is the providence of the trier of fact to pass upon the credibility of the witnesses and the weight to be accorded the evidence produced and the fact finder is free to believe all, part or none of the evidence.**

(Doc. 33-2 at 30; *see also* Doc. 64-6 at 6) This Standard is indistinguishable from the federal standard:

> **[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts**

to ultimate facts.

Jackson v. Virginia, 443 U.S. 307, 319 (1979). Johnson, while relying only on state law, asserted his claim in terms so particular as to call to mind the specific due process right protected by the Fourteenth Amendment as described in *Jackson*. The Pennsylvania courts applied the same legal analysis to the same facts, and presumably came to the same conclusion, as they would have if Johnson had explicitly labeled his claim "federal." In this way, the Pennsylvania courts were given a fair opportunity to initially pass upon Johnson's claim. Neither federal-state comity nor judicial economy would be better served by requiring Johnson to return to the state courts simply because those courts' decisions do not include a "see also" citation to *Jackson v. Virginia*.

Although the Supreme Court has not expressly held that a petitioner fairly presents a

federal claim to the state courts by asserting a state claim that is evaluated under a standard identical to the federal standard, neither does its precedent foreclose this result. In fact, the Supreme Court's frequent focus on the similarity of the state and federal claims at issue suggests such a rule. *See, e.g.*, *Duncan*, 513 U.S. at 366; *Harless*, 459 U.S. at 6; *Picard*, 404 U.S. at 277-78.

However, because the Supreme Court has explicitly left unanswered the question presented here, *Baldwin*, 541 U.S. at 34, Third Circuit precedent controls this case. The Third Circuit has held that a petitioner who presents a claim to the state courts which is decided under identical state and federal standards has given the state courts notice of the legal and factual substance of his claim, and that this satisfies the fair presentation rule. *See Nara*, 488 F.3d at

197-98; *McCandless*, 172 F.3d at 261; *Evans*, 959 F.2d at 1231.

The majority of other federal courts to address this question have come to the same conclusion. *See, e.g., Mulnix v. Sec'y for the Dep't of Corr.*, 2007 WL 3498820, at *1 (11th Cir. Nov. 16, 2007)(holding petitioner fairly presented sufficiency of the evidence claim because federal and Florida standards are identical); *Harrison v. McBride*, 428 F.3d 652, 660-63 (7th Cir. 2005) (holding Supreme Court's decision in *Baldwin* does not require more of a petitioner than the four-part test articulated in *Daye* and later adopted by the Seventh Circuit); *Jackson v. Edwards*, 404 F.3d 612, 620-21 (2d Cir. 2005) (holding that petitioner necessarily presented federal claim where state court's inquiry would have been the same if petitioner had explicitly invoked constitutional provision at issue); *Sanders v. Ryder*, 342 F.3d 991,

1000-01 (9th Cir. 2003) (holding petitioner fairly presented ineffective assistance claim where Washington and federal standards are identical); *Nadworny*, 872 F.2d at 1099-1100 (holding "if an individual's claim, arising under and asserted in terms of state law, is functionally identical – a point of more than trifling concern – to the federal claim, we must regard the federal claim as fairly presented"); *Lowe v. Schomig*, 2007 WL 773881, at *3 (D. Nev. Mar. 9, 2007) ("The Court can see no reason to find a claim unexhausted when the claim has been reviewed by the state courts under the identical standard applied to a claim expressly designated as a federal claim. Such a claim has been fairly presented to the state courts and in fact fully reviewed by those courts."); *Walker v. Palahovich*, 2007 WL 666763, at *6 (E.D. Pa. Feb. 26, 2007) (holding petitioner fairly presented claim despite citing only to state law because "[t]he state

and federal due process inquires for a claim of prosecutorial misconduct are substantively identical"). *But see Barton v. Quarterman*, 2007 WL 2051236, at *3 (N.D. Tex. July 16, 2007) (relying on *Baldwin* for holding that "[e]ven if a state standard is identical to the federal standard of review, a claim must be labeled as a federal issue in order to be fairly presented").

Based on the precedent detailed above, the Court holds that Johnson fairly presented his federal due process claim based on the sufficiency of the evidence to the Pennsylvania courts, and therefore, has exhausted his available state remedies as to this claim.

2. Merits Analysis

a. Legal standard

"[T]he due process guaranteed by the Fourteenth Amendment [mandates] that no person shall be made to suffer the onus of a criminal

conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson*, 443 U.S. at 316. The Court must uphold the jury's verdict if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. It is the role of the jury "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* Therefore, in reviewing a conviction, the court does not weigh evidence or determine the credibility of witnesses and must credit all available inferences in favor of the government. *United States v. Gambone*, 314 F.3d 163, 170 (3d Cir. 2003). The court must examine the totality of the evidence, both direct and circumstantial, *id.* at 170, but the

prosecution may meet its burden entirely through circumstantial evidence, *United States v. Bobb*, 471 F.3d 491, 494 (3d Cir. 2006). This standard of review is highly deferential to the jury's verdict and places an extremely heavy burden on the defendant. *United States v. Lore*, 430 F.3d 190, 203-04 (3d Cir. 2005). "[R]eversal on the grounds of insufficient evidence should be confined to cases where the failure of the prosecution is clear." *United States v. Jimenez*, 513 F.3d 62, 81 (quoting *United States v. Carr*, 25 F.3d 1194, 1201 (3d Cir.), *cert. denied*, 513 U.S. 939 (1994)).

b. Evidence presented at trial

With this standard of review in mind, the Court will summarize the evidence presented at trial. The first witness to testify was Laura Davis, a patrol officer with the Harrisburg Bureau of Police. (N.T. 43.) Officer Davis testified that she was on

patrol in her patrol car in early morning hours of December 15, 1995 when she heard a loud booming sound nearby. (N.T. 45-46.) Officer Davis began to search for the source of the shot and encountered a couple who indicated that someone had been shot in an alley between two houses on Market Street. (N.T. 48.) Officer Davis then encountered a crowd of people in front of the Midnight Special bar, located on 14th and Market Streets, and an individual there indicated he heard a shot from the 1400 block of Market Street. (N.T. 49.) After Officer Davis searched further, an individual waved her over to an alley between 1420 and 1422 Market Street where she discovered the body of Taraja Williams. (N.T. 50-51.) The alley was about four feet wide and extended eight to ten feet back to a fence. (N.T. 58-60.) The body was found just inside the alley. (N.T. 51.)

The next witness was Leroy Lucas, a

member of the Harrisburg police department's forensics unit. (N.T. 68.) When Officer Lucas arrived at the crime scene, he observed multiple sets of footprints leading from the victim back into the alley toward the six-foot fence and on the other side of the fence through the alley. (N.T. 70.) Officer Lucas also recovered from the scene a partial shotgun, with the barrel missing. (N.T. 71.) Officer Lucas testified that the body of the victim was approximately ten feet from the fence, relatively close to the sidewalk at the entrance to the alley. (N.T. 73, 82.)

The next witness was Gary Miller, the son of the owner of the Midnight Special bar. (N.T. 88, 89-90.) Miller testified that he was working at the bar the night of December 14-15, 2005 and recalled seeing Williams and Corey Walker in the bar but did not recall seeing Lorenzo Johnson. (N.T. 90-91.) Miller testified that he was working when

he heard the doorman yelling "you all got to take that out of here" and then went to the door where he saw Walker and Williams leaving. (N.T. 93-94.)

The next witness was Carla Brown, a friend of the victim. (N.T. 98-99.) Brown testified that she was in the bar on the night of December 14-15, 2005 and saw Walker, Johnson, and Williams engaged in an argument. (N.T. 102-03.) Brown could not hear what they were saying, but the argument involved "a lot of arm movements." (N.T. 103-04.) Before long, the bouncer told the three men to leave. (N.T. 102.) Brown followed Walker, Johnson, and Williams as they left the bar "because she wanted to know what was going on." (N.T. 104.) Brown recalled that Walker was wearing a long leather coat and walked as if he had something hidden under it. (N.T. 104-05.) The three men walked in a single-file line with Walker in the front, Williams in the middle, and Johnson in the

back. (N.T. 106.) Brown followed slowly behind with her hood up acting like any other person on the street so that Walker and Johnson did not notice her, but Williams, who knew her, did. (N.T. 106.) The three men continued walking single file until they reached the alley where Walker entered first, Williams entered next, and Johnson remained at the entrance. (N.T. 106, 108.) As she approached the alley, Williams told Brown to keep going. (N.T. 107.) Brown walked a few feet beyond the alley when she heard a loud boom and ran. (N.T. 109-10.)

Brown admitted that she had been addicted to cocaine and that she was high on cocaine at the time of the killing. (N.T. 112.) The amount of drugs in her system, on a scale of one to ten, was about a seven. (N.T. 151.) She also stated that after the incident she ran to a friend's house and got high. (N.T. 128-29, 144.) Brown testified,

however, that she had been clean for nine months and was currently employed. (N.T. 114-15.) Brown admitted that at the preliminary hearing in the case she had testified that she was drunk at the time of the incident but not on drugs. (N.T. 121, 152-53.)

Brown testified that she did not contact police because she was scared that she would be killed too. (N.T. 129-30, 154-55.) Brown admitted that, when she was first contacted by police, she told them she knew nothing about the incident. (N.T. 131-32.)

Brown also testified that while she knew who Victoria Doubs was after being shown a photograph of her, she was not friends with Doubs and had never talked to Doubs about the incident. (N.T. 115, 130-31.)

The next witness was Aaron Dews, an in-house advisor at Visions Youth Works which was

located in one of the buildings bordering the alley. (N.T. 15657.) Dews testified that he and another staff member heard a loud boom on the night of the incident. (N.T. 159.) After checking to see if it was the furnace, Dews looked out the window and saw two silhouettes running up the driveway away from the house. (N.T. 159-60.) Dews stated that he could not see the two individuals in detail because there was plastic over the window. (N.T. 161.)

The next witness was Brian Ramsey, a friend of the victim. (N.T. 164-65.) Ramsey testified that Williams was a cocaine addict who sometimes sold drugs to support his habit. (N.T. 166.) He stated that he knew who Walker and Johnson were and that he had seen them together most of the time. (N.T. 167.) Ramsey testified that on the night of the incident, he was selling drugs on Market Street near the Midnight Special bar. (N.T. 169.) Williams was also out on Market Street

making runs for drug dealers that night. (N.T. 171.) Ramsey first testified that, when he last saw Williams, he was moving into an alley with two individuals. (N.T. 174.) On cross-examination, Ramsey corrected himself, stating that he saw three individuals with Williams, one female and two males. (N.T. 186-88.) This testimony was consistent with the statement he gave police on the night of the incident. (N.T. 191.) Ramsey testified that one of the individuals with Williams walked with a limp, so Ramsey assumed it was a "crippled guy" whom he knew to be a drug dealer. (N.T. 176.) Ramsey stated he assumed Williams was in the alley to make a drug deal. (N.T. 174.) However, he testified that "I would say he was forced in that alley." (N.T. 189.)

A minute after Ramsey saw Williams and the individuals enter the alley, he heard a loud boom. (N.T. 176-77.) After Ramsey heard the shot,

he walked around the block. (N.T. 177.) When he returned, he noticed Walker and Johnson among the crowd of people in front of the Midnight Special bar. (N.T. 178.) Ramsey testified that Walker and Johnson seemed stunned, "like sort of maced ... like what happened, Taraja has been killed ... are you serious." (N.T. 179.)

Ramsey admitted that he was serving a sentence in Dauphin County Prison, that he was under the influence of cocaine on the night of the incident, and that while he was still a drug addict, he was in recovery. (N.T. 164, 166, 168, 193.)

The next witness was Detective Kevin Duffin of the Harrisburg Bureau of Police, who investigated the Williams murder. (N.T. 197-98.) Detective Duffin testified that, at around noon on December 15, 1995, he was in an unmarked car when he approached three individuals in a brown Ford. (N.T. 200.) The Ford sped away at a high

rate of speed in an attempt to get away from him. (N.T. 200.) Detective Duffin placed a light on the roof of his car and pursued the Ford. (N.T. 205-06.) When the Ford struck another car, the three occupants fled on foot. (N.T. 206-07.) Two of the individuals were apprehended. (N.T. 207.) One of them was Johnson. (N.T. 207.)

The next witness, Victoria Doubs, testified that she, Walker, and Johnson were "close friends" who "ran the streets together." (N.T. 211, 212-13.) On December 14, 1995, Doubs, Walker, and Johnson woke up together at around 11:00 a.m. in a house at 18th and Carnation Streets. (N.T. 214.) They went out to buy some marijuana and then were hanging out in front of the Kentucky Fried Chicken near 14th and Market Streets. (N.T. 215.) When Williams approached, Walker went over to talk to him and the two of them walked back toward Johnson and Doubs. (N.T. 217.) Doubs

testified that Walker and Williams "were talking about the money that Taraja [Williams] had owed us." (N.T. 217.) Walker continued to confront Williams about the money. (N.T. 218.) Williams "started getting smart," began "cussing out" Walker, and told "him he'd give it to him when he felt like and he ain't scared of him." (N.T. 218.) Walker hit Williams and they started to fight. (N.T. 218.) Williams won the fight, beating Walker with a broomstick. (N.T. 218-19.)

Many people saw Williams beat Walker, which made Walker very angry. (N.T. 219.) After the fight, Walker, Johnson, and Doubs left. (N.T. 219.) Doubs and others laughed at Walker and made jokes. (N.T. 220.) Walker stated "I'm going to kill that crackhead. I'm going to kill that kid." (N.T. 221.) Doubs testified that Walker "was hot. He was heated." (N.T. 221.) Johnson was present when Walker made these statements. (N.T. 221.)

Walker, Johnson, and Doubs returned to the house at 18th and Carnation Streets where others were told about the fight and also made fun of Walker. (N.T. 221.) This made Walker angry and he repeated that he was "going to kill that kid." (N.T. 221-22.)

Doubs testified that she first told police that late on the night of December 14, 1995, she, Johnson, Suquan Ripply, "a guy named Cliff, and a girl named Ree-Ree" were on their way to New York. (N.T. 222-25.) The next time Doubs met with police, however, she told them that she had lied and did not actually recall being in New York on the night of the murder. (N.T. 225.) Doubs told police that she had made up her initial statement because "she was going to be paid to tell that story.... [M]y bail was supposed to be paid." (N.T. 225.) Doubs explained that one of Walker and Johnson's friends named Larry was going to pay

her to tell the story to police. (N.T. 227.) Doubs stated that she went to New York with this same group "two to three times a week," but could not say that she was in New York with Johnson on December 14 or 15, 1995. (N.T. 225-26.)

Finally, Doubs testified that sometime after Williams' death, she ran into Carla Brown and that the two of them got high together. (N.T. 227-28.) Doubs testified that, while they were smoking crack together, Brown stated that Walker had given her a couple of crack rocks to take Williams into the alley on the night of the murder. (N.T. 228.)

On cross-examination, Doubs admitted that she had a conviction for forgery in connection with stolen checks. (N.T. 238-39.) Doubs also admitted that she was in Dauphin County Prison on a robbery conviction. (N.T. 239.)

The next witness was Sergeant Frederick Wentling of the Pennsylvania State Police who testified about the partial shotgun recovered from the crime scene. (N.T. 241-78.)

The next witness was Suquan Ripply, who was incarcerated in Dauphin County Prison at the time. (N.T. 257-58.) Ripply was one of the individuals that fled from Detective Duffin on December 15, 1995. (N.T. 259.) Ripply first testified that he, Johnson, David Hairston, Vicki Doubs, a man named Clifton, and woman named Ree-Ree left Harrisburg for New York around 4:00 p.m. on December 14, 1995 and did not return until 4:00 a.m. on December 15, 1995. (N.T. 260-61.) Ripply admitted that he had initially told police this same story, but later told police that this story was false and that he was not in New York with Johnson on the night of the murder. (N.T. 265-66.) On the stand, Ripply testified that his first

statement was actually correct and that he told Detective Duffin "what he wanted to hear" after the detective told him he would be charged with perjury if he was lying. (N.T. 262-64.) On re-cross examination, Ripply admitted that he made the trip to New York with Johnson many times, that he was "off with the dates" when he made his first statement to police, and was "not exactly" sure whether he was with Johnson in New York on December 14 or December 15. (N.T. 272-75.)

The next witness, Dr. Wayne Ross, medical examiner, testified that the cause of Williams' death was a shotgun wound to the chest. (N.T. 279-93.)

The next witness, Eric Chambers, a bouncer at the Midnight Special bar, testified that he was at the bar on the night of the incident, and saw Williams and others get kicked out, but did not see Johnson there that night. (N.T. 297-302.)

The next witness, Lashawyn Jackson, was Walker's girlfriend and testified that Walker was with her in the Midnight Special bar all night on December 14-15, 1995. (N.T. 312-13, 315.) On cross-examination, however, Jackson was uncertain of the date that she and Walker were in the bar. (N.T. 325-28.) Jackson also admitted that she never contacted the police to provide this information after Walker's arrest. (N.T. 320-25.)

The final witness, Clifton Germaine, was a friend of Walker and Johnson who testified that on a date he could not remembered he, Johnson, and a woman whose name he could not remember went to New York. (N.T. 333-35.) Germaine did not know who Suquan Ripply or Victoria Doubs were. (N.T. 334, 337.)

c. State-court decisions

Johnson first presented his sufficiency of the

evidence claim in his post-sentence motion to the Court of Common Pleas. The court recounted in detail the facts adduced at trial and rejected Johnson's argument. (Doc. 33-2 at 27-29, 31.)

The court's analysis was as follows:

> The Commonwealth presented the testimony of Carla Brown who followed the two defendants and the victim in the alley where the victim was ultimately shot. She stated that Corey Walker was walking with a limp and it looked to her as if he was concealing something under his coat.... [I]t was for the jury to determine whether the circumstantial evidence, especially the testimony of Carla Brown concerning her observations, was enough to find beyond a reasonable doubt that the defendants were responsible for the victim's death. Victoria Doubs' testimony provided a motive for the defendants' attack. She stated that earlier on the day of the incident the victim and Corey Walker had an altercation and that the victim embarrassed the defendant in front of his friends

> and associates. She stated that the defendant repeatedly remarked that he was going to kill the victim. Although both defense counsel tried to discredit this witness' testimony based on her character, prior convictions and current incarceration, it was solely within the province of the jury to determine whether her testimony was credible. Both defendants presented alibi witnesses who testified that they were not in the vicinity of the shooting at the time of incident. Suquan Ripply testified that Lorenzo Johnson was with him in New York at the time of the incident and Corey Walker's girlfriend, Lashawnyn [sic] Jackson, testified that Corey was with her at the Midnight Special Bar the entire evening of the incident. Again, it was for the jury to determine whether the purported alibi defenses were meritorious.

(*Id.* at 31-32.)

Johnson again raised a sufficiency of the evidence argument on direct appeal. The Superior Court adopted the Court of Common Pleas'

summary of the evidence, and affirmed Johnson's conviction. (Doc. 64-6 at 3-5, 6.) The Superior Court's analysis was:

> The various witnesses' testimony revealed that Lorenzo Johnson, Corey Walker, and the victim were arguing inside the Midnight Special Bar and were told to leave. The trio walked out, with the victim between Lorenzo Johnson and Corey Walker. They proceeded into an alley, and a shot was heard. Two men were observed fleeing the scene, and the victim's body was discovered in the alley. Presented with this evidence, the jury had a sound basis upon which to conclude that a conspiracy existed between Lorenzo Johnson and Corey Walker to murder Taraja Williams.

(*Id.* at 6.)

d. Analysis

In reviewing the sufficiency of the evidence, a federal habeas court must apply "the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324 n.16. In this case,

Johnson was convicted of first-degree murder as an accomplice. Under Pennsylvania law, "[a] person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both." 18 Pa. C.S.A. § 306(a). "A person is legally accountable for the conduct of another person when ... he is an accomplice of such other person in the commission of the offense." 18 Pa. C.S.A. § 306(b). "A person is an accomplice of another person in the commission of an offense if: (1) with intent of promoting or facilitating the commission of the offense, he: (i) solicits such other person to commit it; or (ii) aids or agrees or attempts to aid such other person in planning or committing it." 18 Pa. C.S.A. § 306(c).

"Accordingly, two prongs must be satisfied for a person to be labeled an 'accomplice.' First, there must be evidence that the person intended to aid or promote the underlying offense. Second,

there must be evidence that the person actively participated in the crime by soliciting, aiding, or agreeing to aid the principal." *Commonwealth v. Rega*, 933 A.2d 997, 1015 (Pa. 2007) (quoting *Commonwealth v. Murphy*, 844 A.2d 1228, 1234 (Pa. 2004)). "While these two requirements may be established by circumstantial evidence, a defendant cannot be an accomplice simply based on evidence that he knew about the crime or was present at the crime scene. There must be some additional evidence that the defendant intended to aid in the commission of the underlying crime, and then did or attempted to do so." *Murphy*, 844 A.2d at 1234. Unlike criminal conspiracy, there is no requirement to show that the defendant reached an agreement with the principal to find accomplice liability; mere rendition of aid is sufficient. *Id.*; *Commonwealth v. Kimbrough*, 872 A.2d 1244, 1251 (Pa. Super. Ct. 2005). "With regard to the amount of aid, it need

not be substantial so long as it was offered to the principal to assist him in committing or attempting to commit the crime." *Murphy*, 844 A.2d at 1234. "The least degree of concert or collusion is sufficient to sustain a finding of responsibility as an accomplice." *Commonwealth v. Cocciolletti*, 425 A.2d 387, 390 (Pa. 1981).

Johnson was also convicted of criminal conspiracy. "A person is guilty of conspiracy with another person ... to commit a crime if with the intent of promoting or facilitating its commission he: (1) agrees with such other person ... that they or one or more of them will engage in conduct which constitutes such crime ... or (2) agrees to aid such other person ... in the planning or commission of such crime." 18 Pa. C.S.A. § 903. "To convict a defendant of conspiracy, the trier of fact must find that: (1) the defendant intended to commit or aid in the commission of the criminal act; (2) the

defendant entered into an agreement with another (a 'co-conspirator') to engage in the crime; and (3) the defendant or one or more of the other co-conspirators committed an overt act in furtherance of the agreed upon crime. The essence of a criminal conspiracy, which is what distinguishes this crime from accomplice liability, is the agreement made between the co-conspirators." *Murphy*, 844 A.2d at 1238. "Once the trier of fact finds that there was an agreement and the defendant intentionally entered into the agreement, that defendant may be liable for the overt acts committed in furtherance of the conspiracy regardless of which co-conspirator committed the act." *Id.*

"Direct evidence of the defendant's criminal intent or the conspiratorial agreement, however, is rarely available. Consequently, the defendant's intent as well as the agreement is almost always

proven through circumstantial evidence, such as by the relations, conduct or circumstances of the parties or overt acts on the part of the co-conspirators." *Id.* (quoting *Commonwealth v. Spotz*, 716 A.2d 580, 592 (Pa. 1998)). "Among the circumstances which are relevant, but not sufficient by themselves, to prove a corrupt confederation are: (1) an association between alleged conspirators; (2) knowledge of the commission of the crime; (3) presence at the scene of the crime; and (4) in some situations, participation in the object of the conspiracy. The presence of such circumstances may furnish a web of evidence linking an accused to an alleged conspiracy beyond a reasonable doubt when viewed in conjunction with each other and in the context in which they occurred." *Commonwealth v. Lambert*, 795 A.2d 1010, 1016 (Pa. Super. Ct. 2002). However, "[a]s with accomplice liability, mere association with the

perpetrators, mere presence at the scene, or mere knowledge of the crime is insufficient to establish that a defendant was part of a conspiratorial agreement to commit the crime. There needs to be some additional proof that the defendant intended to commit the crime along with his co-conspirator." *Murphy*, 844 A.2d at 1238 (quoting *Lambert*, 795 A.2d at 1016).

Both Pennsylvania courts to address the merits of Johnson's claim found the evidence sufficient for the jury to find these elements beyond a reasonable doubt. Based on the evidence detailed above, viewed, as it must be, in the light most favorable to the jury's verdict, the Court cannot conclude that the Pennsylvania courts' decisions were contrary to, or involved an unreasonable application of, federal law or were based on an unreasonable determination of the facts.

Johnson does not dispute that Williams was

killed with a shotgun or that Walker was the principal in this offense. The evidence presented at trial also established the following: Johnson and Walker were close friends who were almost always together. Williams owed them money which he refused to pay.[14] On the day of the murder, Johnson witnessed his friend being beaten and humiliated by Williams and was present when Walker repeatedly stated that he was going to kill the victim. Shortly before the murder, Johnson, Walker, and Williams engaged in an argument at the Midnight Special bar, which was heated enough to result in the three being thrown out of the bar. After leaving the bar, the three men walked in a

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[14] Johnson argues that Doubs' testimony that Williams owed "us" money is unclear and that the debt could have been owed to Walker alone. However, given the testimony of Doubs and other witnesses regarding the close relationship between Walker and Johnson, and the context of Doubs' testimony which addressed the actions and relationship of herself, Walker, and Johnson collectively, it was reasonable for the jury to take Doubs' testimony at face

single file line to the alley where the victim was shot, with Walker in front, the victim in the middle, and Johnson in the rear. Walker moved as if he had something hidden under his long coat. Walker entered the alley, followed by the victim,[15] and Johnson stood at the entrance of the four-foot-wide walkway. Very shortly thereafter, a loud shot was heard from the alley, and two individuals were seen running from the rear of the alley. The victim's body was found near the entrance to the alley, and multiple sets of footprints were found leading from the body to a fence in the middle of the alley and on the opposite side of the fence out the rear of the alley. The next day, Johnson fled from the detective investigating the murder.[16]

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value and find that Williams owed the money to all three collectively.

[15] Ramsey testified that Williams was "forced" into the alley.

[16] Further, the jury was entitled to weigh the dubious credibility of the alibi statements provided by Victoria Doubs, Suquan Ripply, and Clifton Germaine.

From this evidence, a rational jury could convict Johnson as an accomplice. A jury could find that Johnson intended to aid Walker from the evidence regarding their close relationship; the debt that Williams owed them but refused to pay; the beating that Williams inflicted on Walker as Johnson looked on; Walker's repeated statements, in Johnson's presence, that he was going to kill Williams; and Johnson's participation in the argument with Williams at the bar. A jury could also rationally infer that Johnson aided or attempted to aid Walker in killing Williams from the evidence showing that Johnson walked ("forced") Williams into the alley, stood at the entrance to the alley when Williams was shot, and fled from the officer investigating the murder.

Similarly, a rational jury could find the agreement between Johnson and Walker required to convict Johnson of criminal conspiracy through

the circumstantial evidence presented, including Johnson's: (i) close association with Walker, (ii) awareness of Walker's threats to kill Williams, (iii) consciousness of guilt reflected in fleeing from police, (iv) participation in multiple altercations with Williams, (v) presence at the scene of the crime, (vi) participation in the offense by walking Williams into the alley and standing at the exit, and (vii) Doubs' testimony that Johnson's and Walker's friend paid her give a false alibi.

Johnson argues that the Commonwealth proved only his presence at the scene of the crime, which is insufficient to sustain his convictions. This argument, however, ignores much of the evidence presented at trial and the reasonable inferences that the jury could permissibly draw from such evidence. As an initial matter, Johnson's presence at the crime scene, while not enough to establish guilt by itself, is relevant evidence to be

considered by the jury. *See, e.g., Lambert*, 795 A.2d at 1016. Moreover the evidence presented at trial established more than Johnson's mere presence at the scene. Following the altercation between Walker and Williams earlier in the day, and directly following the argument with Williams that got them kicked out of the bar, Johnson walked Williams into the alley where he was shot and then stood at the entrance. Johnson argues that there was no evidence to show that he "was purposefully walking with the other two men, as opposed to only walking in the same general direction as them" and that, while the evidence showed he stood at the entrance to the alley after Williams entered, "there was no evidence that he was purposefully at this location at the time of the shooting." (Doc. 33 at 19.) These arguments stretch the bounds of credulity. Johnson completely ignores Brown's testimony that he walked Williams into the alley and Ramsey's

testimony that Williams was forced into the alley. Further, in light of the multiple altercations with Williams that day, including the heated argument in the bar only moments before, it is certainly a rational inference that Johnson intentionally walked Williams toward the alley and then purposefully stood blocking the entrance. Indeed, it is difficult to conceive how any rational trier of fact could conclude from the evidence presented that Johnson just happened to be walking in the same direction as Walker and Williams and serendipitously stopped at the entrance to the alley while Williams was shot.

Johnson also argues that the Commonwealth's evidence of his presence at the scene of the crime, knowledge of the crime, and association with Walker are insufficient to establish the requisite intent to prove accomplice liability or the agreement required to prove

criminal conspiracy. While Johnson is correct that mere presence, knowledge, or association *each by itself* is insufficient to prove accomplice liability or criminal conspiracy, these circumstances, when "viewed in conjunction with each other and in the context in which they occurred" are relevant proof of such charges. *Lambert*, 795 A.2d at 1016. As discussed above, these factors, viewed in the context of the relationship between Walker, Johnson, and Williams and the conduct of the parties, are sufficient to support the jury's verdict in this case.

Similarly, Johnson argues that evidence of motive and his flight from investigating officers is insufficient to support his convictions. Again, Johnson is correct that motive or consciousness of guilt *alone* are insufficient support a finding of guilt, but in this case Johnson's motive and flight were only some of the pieces of circumstantial

evidence supporting his convictions. The jury was entitled to weigh this relevant evidence with the rest, and the verdict the jury reached is supported by the totality of the evidence presented.

The evidence presented at trial, viewed in the light most favorable to the prosecution, was sufficient under *Jackson v. Virginia* to allow a rational trier of fact to find Johnson guilty of the elements of the charged crimes beyond a reasonable doubt. The Pennsylvania courts' identical decision under the identical state-law standard therefore was not contrary to, and did not involve an unreasonable application of, clearly established federal law.

Finally, Johnson also argues that the Superior Court relied on three "incorrect" facts in its decision and therefore its decision "was based on an unreasonable determination of the facts" under 18 U.S.C. § 2254(d)(2). As an initial matter, the

Superior Court adopted and quoted in full the trial court's recitation of the evidence, which Johnson does not claim was unreasonable. (*See* Doc. 64-6 at 3-5.) The Superior Court clearly based its decision on the totality of this evidence, and the fact that the court further summarized the evidence in presenting its analysis does not render its decision unreasonable. Moreover, Johnson's challenges to the Superior Court's individual factual recitations are without merit. First, Johnson quibbles with the court's statement that "they" – meaning Johnson, Walker, and Williams – "proceeded into an alley", contending that Johnson never entered the alley. This argument is mere semantics. The evidence established that the three men walked in a single file line to the alley, with Johnson directly behind Williams, and that Johnson stood at the entrance to the alley. The court's statement was accurate. Second, Johnson

argues that the court's statement that "two men were observed fleeing the scene" is incorrect since Aaron Dews, the only witness to so testify did not know the gender of the individuals because he was looking through plastic-covered windows. Dews did testify that he saw two "silhouettes" fleeing, rather than two "men." However, in its recitation of the facts, the Superior Court also quoted from the Court of Common Pleas' opinion, stating that Dews "heard a loud boom and when he looked out the window he saw two silhouettes running out the driveway." (Doc. 64-6 at 4.) In the context of the totality of the evidence – which the Superior Court clearly recited and reviewed – one instance of arguably poor word choice does not render the court's decision objectively unreasonable. Finally, Johnson contends that the court incorrectly stated that he, Walker, and Williams were arguing in the bar. Johnson argues that because Carla Brown did

not hear the contents of the argument, it is possible that he was only "passively listening" or, in fact, was attempting to dissuade Walker from taking any action against Williams. Brown, however, testified that Johnson was involved in the argument, and the argument was contentious enough to result in Johnson being thrown out of the bar. Further, given the evidence of Johnson and Walker's close relationship, the money that Williams' owed them, and the beating inflicted on Walker earlier that day, a rational jury could reasonably infer that Johnson participated in the argument on Walker's side. The Superior Court's decision that the evidence presented at trial sufficiently supports Johnson's convictions was not based on an unreasonable determination of the facts, and therefore, Johnson's sufficiency of the evidence claim will be denied.

B. *Brady* Claim

Johnson's second claim is that his due process rights were violated by the failure of the prosecution to disclose the existence of a plea agreement between the government and witness Victoria Doubs. The Respondents argue that Johnson's *Brady* claim is procedurally defaulted because it was denied as procedurally barred by the state courts. Alternatively, the Respondents argue that Johnson's claim fails on the merits. The Court finds that Johnson's *Brady* claim is procedurally defaulted and will deny the claim on that ground.

1. Background

On February 10, 1997, Victoria Doubs pled guilty in the Dauphin County Court of Common Pleas to criminal conspiracy to commit robbery and theft by unlawful taking. (Doc. 33-2 at 59.) Doubs pled guilty pursuant to a

negotiated plea agreement in exchange for a county sentence.[17] (*Id.* at 60.) These charges were prosecuted, and the plea agreement was entered into by, the Office of the District Attorney of Dauphin County (the "county prosecutor"). (*See id.* at 59.) The court accepted Doubs' plea and deferred sentencing to the call of the county prosecutor. (*Id.* at 64.)

On March 14, 1997, Doubs testified at Johnson and Walker's trial. On cross-examination, Doubs testified that she had come to court from Dauphin County Prison where she was incarcerated on robbery charges. (N.T. 238-39.) The following exchange then occurred between Doubs and Johnson's counsel:

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[17] A "county sentence" is a sentence of a maximum of two years imprisonment served in a county jail, rather than a state prison.

Q Now, has [the prosecutor] Mr. Abruzzo made any kind of assurances or promises to you with respect to that charge you have coming up in relation to the testimony you're giving here today?

A No, he hasn't.

Q He hasn't promised you any kind of leniency or anything? A No, he hasn't. Q Did he tell you that he'd do whatever he could to help you out?

A No, he didn't.

(N.T. 239-40.)

On March 26, 1997, Doubs was sentenced on the charges to which she had pled guilty in the Dauphin County Court of Common Pleas. (Doc. 33-2 at 65.) The county prosecutor explained the reasons for the plea agreement with Doubs:

> The reason for the agreement was the – her involvement was one as a conspirator. She waited in the car. She didn't do anything. The overt act were [sic] committed by the cofelon....

> The reason for the agreement was, my only proof was the testimony of the principal and I wasn't real comfortable using the principal against the accomplices. So I gave her a pretty good deal rather than having to give him too....
>
> The agreement was that I wouldn't charge her with robbery and that she would waive it in for county sentence. The Court should also be aware that Miss Doubs testified in the case against Corey Walker and Lorenzo Wallace [sic].
>
> There were no promises made to her in connection with her testimony. However, I consider her cooperation very relevant. She was an important witness.
>
> The Attorney General's Office informed me that she was very cooperative, and that should be taken into consideration in imposing sentence.

(Doc. 33-2 at 67-68.)

At the hearing on Johnson's first PCRA petition, Johnson's trial counsel, Deanna Wagner Muller, testified that, at the time of trial, she was

aware that charges were pending against Doubs but was not aware that Doubs had already pled to those charges. (Doc. 66-25 at 14-16.) Muller testified that she inquired of Johnson's prosecutor whether any plea negotiation had been offered to Doubs, and, at the time of trial, was told that Doubs had not received any kind of plea or deal. (*Id.* at 18-19.) Muller indicated that, had she been aware of Doubs' plea agreement at the time of trial, she would have used that information in cross-examining Doubs. (*Id.* at 16, 19.) Muller further testified that Johnson's prosecutor followed an "open file" policy, allowing her access to everything in his file. (*Id.* at 39.)

Christopher Abruzzo of the Pennsylvania Attorney General's Office, the prosecutor at Johnson and Walker's trial, also testified at the PCRA hearing. Abruzzo testified that, at the time of trial, he was unaware of any plea agreement

between Doubs and the Dauphin County District Attorney. (*Id.* at 77.) Abruzzo stated that he never offered Doubs anything in exchange for her testimony, and in fact, affirmatively indicated to Doubs that she would get no benefit from her testimony. (*Id.* at 77, 83-84.) Abruzzo indicated that Doubs had already provided a statement to police regarding the case and that she was going to be subpoenaed to testify based on that statement. (*Id.* at 77-78.) Because Doubs had already given this statement to police, Abruzzo never considered making her any kind of deal. (*Id.* at 77-78, 79.) After trial, and prior to Doubs' sentencing, the attorney from the Dauphin County District Attorney's Office who was prosecuting the charges against Doubs contacted Abruzzo to ask whether Doubs had been cooperative and testified truthfully at trial, and Abruzzo indicated to the county prosecutor that she had. (*Id.* at 77, 79-80.)

2. State-Court Decisions

In his post-trial motions and direct appeal, Johnson did not raise any argument based on the prosecution's alleged failure to disclose a plea agreement with Doubs. In his first PCRA petition, citing both to *Brady* and Pennsylvania precedent, Johnson argued that he "was denied his constitutional right to a fair trial, in that the Commonwealth attorney failed to correct the perjured testimony of Victoria Doubts, in that Ms. Doubs testified she was not promised or expected leniency for her pending criminal charges." (Doc. 66-2 at 18-20.)

The Court of Common Pleas rejected Johnson's argument and found that his due process rights had not been violated. (Doc. 33-2 at 88.) The court reasoned:

> While the prosecution has a duty to disclose to the defense, the court and the jury the existence of a plea

> agreement with a prosecution witness, we do not believe any such agreement existed herein. The record of Doubs' sentencing does not support a claim that Doubs received favorable treatment for any reason related to her testimony in the Johnson trial. The statements to the court by the prosecutor in the robbery case reflects [sic] that the plea agreement for a county sentence was based upon weaknesses in the county case against Doubt, not a *quid pro quo* for testimony in the homicide case.... Accordingly, because no agreement existed with the Office of the Attorney General, the Commonwealth breached no duty to disclose which resulted in deprivation of [Johnson's] due process rights.

(*Id.* at 89-90.)

Johnson reiterated his *Brady* argument in the appeal of his PCRA petition to the Superior Court. (Doc. 66-5 at 13-16.) The Superior Court held that because Johnson had not raised this claim on direct appeal, the claim was not preserved for post-conviction review and was waived. (Doc. 33-2 at 96-97.) The Superior Court noted that Johnson did not argue that his counsel was

ineffective for failing to raise this claim. (*Id.* at 97 n.5.)

3. Procedural Default

Respondents first argue that Johnson's *Brady* claim is procedurally defaulted because the Superior Court found it to be procedurally barred under state rules. The Court agrees and will deny Johnson's *Brady* claim for this reason.

a. Legal standard

"The procedural default doctrine precludes a federal habeas court from 'reviewing a question of federal law decided by a state court if the decision of that court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'" *Bronshtein v. Horn*, 404 F.3d 700, 707 (3d Cir. 2005) *cert. denied*, 546 U.S. 1208 (2006) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). The requirements of "independence" and "adequacy"

are distinct. *Leyva*, 504 F.3d at 365-66.

A state procedural ground is not "independent", and thus will not bar federal habeas relief, "if the state law ground is so 'interwoven with federal law' that it cannot be said to be independent of the merits of a petitioner's federal claims." *Johnson v. Pinchak*, 392 F.3d 551, 557 (3d Cir. 2004) (quoting *Coleman*, 501 U.S. at 740). In determining whether a state court ground is independent, a habeas court first determines whether the decision of the last state court to which the petitioner presented his federal claim "fairly appears to rest primarily on federal law, or to be interwoven with the federal law." *Id.* If so, only then does the court determine if the decision of last state court rendering judgment on the claim "clearly and expressly states that its judgment rests on a state procedural bar" rather than the merits of the claim. *Id.*

"The United States Supreme Court has employed a variety of tests to determine whether a state ground is 'adequate.'" *Bronshtein*, 404 F.3d at 707. Generally, "[a] state rule is 'adequate' for procedural default purposes if it was firmly established, readily ascertainable, and regularly followed at the time of the purported default." *Leyva*, 504 F.3d at 366. Conversely, "state procedural rules have been held to be inadequate if they are not firmly established and regularly followed or if they are novel and unforeseeable." *Bronshtein*, 404 F.3d at 707 (citations omitted). In assessing adequacy, a court considers whether: "(1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to

review the petitioner's claims on the merits; and (3) the state courts' refusal in this instance is consistent with other decisions." *Leyva*, 504 F.3d at 366 n.10 (quoting *Jacobs v. Horn*, 395 F.3d 92, 117 (3d Cir. 2005)). The adequacy test serves two purposes. "First, the test ensures that federal review is not barred unless a habeas petitioner had fair notice of the need to follow the state procedural rule." *Bronshtein*, 404 F.3d at 707. Second, the test prevents discrimination by ensuring that habeas review is foreclosed only "by what may honestly be called 'rules' – directions of general applicability – rather than by whim or prejudice against a claim or claimant." *Id.* at 707-08.

b. Independence and adequacy

In this case, the Superior Court did not base its decision regarding Johnson's *Brady* claim on federal law, but clearly and expressly denied his claim based on Pennsylvania procedural rules. The rule was thus "independent" of the federal question raised by Johnson's claim.

The procedural rule upon which the Superior Court based its decision was also "adequate." The only state appellate court to address Johnson's *Brady* claim refused to review the claim on the merits. The Superior Court denied Johnson's due process claim after finding it had been waived because the claim was not raised on direct appeal. The terms of this state procedural rule are firmly established by statute and are unmistakable.

Under 42 Pa. C.S.A. § 9543(a)(3), to be eligible for PCRA relief, "the petitioner must plead and prove by a preponderance of the evidence ... [t]hat the allegation of error has not been ... waived." Under 42 Pa. C.S.A. § 9544(b), "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post conviction proceeding." This waiver rule has been regularly and consistently applied by Pennsylvania courts in non-capital cases. *See, e.g., Commonwealth v. Natividad*, 938 A.2d 310, 331 n.15 (Pa. 2007); *Commonwealth v. Carson*, 913 A.2d 220, 263 (Pa. 2006); *Commonwealth v. Abdul-Salaam*, 808 A.2d 558, 583-84 (Pa. 2001); *Commonwealth v. Pursell*, 724 A.2d 293, 306 (Pa. 1999); *see also* 2 West Pa.

Prac., Crim. Pro. § 17.2 (2d ed. 2007) (collecting Pennsylvania precedent). The Third Circuit and numerous federal district courts in Pennsylvania have therefore found the rule to provide an adequate state-law ground precluding habeas review. *See, e.g., Peterson v. Brennan*, 196 Fed. Appx. 135, 142 (3d Cir. 2006); *Sistrunk v. Vaughn*, 96 F.3d 666, 674 (3d Cir. 1996); *Edwards v. Rozum*, C.A. No. 07-1736, 2008 WL 351905, at *10 (E.D. Pa. Feb. 7, 2008); *Rivera v. Tennis*, C.A. No. 06-142, 2007 WL 1965430, at *4 (W.D. Pa. July 3, 2007); *McMullen v. Tennis*, C.A. No. 06-183, 2006 WL 3437314, at *6 (M.D. Pa. Nov. 29, 2006). The Court likewise finds the Superior Court's decision in this case was based on an adequate state rule.

Johnson argues that the alleged *Brady* violation itself makes § 9544(b) inadequate because the prosecution's purported suppression at trial made it impossible for him to raise the issue on direct appeal under Pennsylvania Rule of Appellate Procedure 302(a) which states that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." This argument is unpersuasive. "First, although ordinarily '[i]ssues not raised before the lower court are waived and cannot be raised for the first time on appeal,' Pa. R.A.P. 302(a), a claim will not be considered waived if it could not have been raised in the lower tribunal." *Commonwealth v. Mouzon*, 812 A.2d 617, 624 n.10 (Pa. 2002); *see also* Pa. R. Crim. P. 702(C) & miscellaneous comment (requiring that any claim of after-discovered evidence must be raised promptly after its discovery and noting that "after-discovered evidence discovered during the

direct appeal process must be raised promptly during the direct appeal process"). Thus, as the Superior Court found, Johnson "could have" raised his claim on appeal "but failed to do so." *See* 42 Pa. C.S.A. § 9544(b).

Moreover, Johnson's argument conflates two separate inquiries. The merits of Johnson's *Brady* claim do not determine whether the claim is procedurally defaulted. *See, e.g., Tillery v. Horn*, 142 Fed. Appx. 66, 68 (3d Cir. 2005) (refusing to consider petitioner's argument that the Superior Court incorrectly determined claim was waived because such an argument "conflat[es] concepts of the adequacy and independence of a state procedural rule with the correctness of the state court's application of its own law"). On habeas review, this Court must determine whether the procedural rule applied by the state court is independent and adequate, but is not at liberty to

second-guess the state court's application of its own independent and adequate rule. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 6768 (1991) ("We have stated many times that federal habeas corpus relief does not lie for errors of state law."); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (same); *Taylor v. Horn*, 504 F.3d 416, 448 (3d Cir. 2007) ("It is well established that a state court's misapplication of its own law does not generally raise a constitutional claim. The federal courts have no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."). The Superior Court found that Johnson had waived his claim under an independent and adequate procedural rule, and therefore, Johnson's *Brady* claim is procedurally defaulted.

c. Cause and prejudice

Johnson's procedural default does not end our inquiry, however. Procedural default does not bar federal habeas review if a petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.[18]

To establish cause for a procedural default, a

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[18] Johnson does not argue that there was a "fundamental miscarriage of justice," which generally requires a petitioner to establish "actual innocence" by proving "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Slutzker v. Johnson*, 393 F.3d 373, 381 n.7 (3d Cir. 2004) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Because sufficient evidence was presented for a reasonable jury to convict Johnson, it is highly unlikely that he could meet this stringent standard. *See id.* In any event, the "cause and prejudice" ground for excusing procedural default must be addressed before examining "actual innocence." *Id.* (citing *Dretke v. Haley*, 541 U.S. 386, 393-94 (2004)).

petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). For example, the petitioner may show "that the factual or legal basis for a claim was not reasonably available to counsel or that some interference by officials made compliance impracticable." *Id.* (citations omitted). To demonstrate actual prejudice, the petitioner must show "not merely that the errors at trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 494 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)).

In this case, as in most such cases, the cause

and prejudice inquiry parallels the merits of the alleged *Brady* violation itself. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 282 (1999); *Slutzker v. Johnson*, 393 F.3d 373, 385-86 (3d Cir. 2004). In *Brady*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Strickler*, 527 U.S. at 281 (quoting *Brady*, 373 U.S. at 87). There are three components of a *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the state, either willfully or inadvertently; and (3) prejudice must have ensued, in that the evidence was material to the case. *Id.* at

281-82. Here, the first element is fulfilled because it is beyond cavil that the evidence at issue, Doubs' plea agreement, could have been used by Johnson to impeach Doubs.[19] (*See* Doc. 66-25 at 16, 19.) The existence of the second and third elements will also answer the cause and prejudice question. Suppression of the plea agreement would constitute cause for Johnson's failure to assert his *Brady* claim on direct appeal, and unless this evidence is material for *Brady* purposes, its suppression did not give rise to sufficient prejudice to overcome his procedural default. *See Banks*, 540 U.S. at 691;

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[19] The Respondents argue that because Doubs' plea agreement involved no quid pro quo for her testimony that it is not favorable evidence for *Brady* purposes. The plea agreement, however, was at least colorably relevant to impeaching Doubs' credibility. The impeaching effect of this evidence is certainly lessened by the fact that the plea agreement had nothing to do with Doubs' testimony, but this argument goes to *how* favorable the evidence is rather than *whether* it is favorable at all, and is better addressed as part of the materiality inquiry.

Strickler, 527 U.S. at 282. For the reasons that follow, the Court finds that the prosecution did suppress the plea agreement and thus that Johnson had cause for failing to raise his claim on direct appeal. However, the Court also finds that Johnson has failed to demonstrate that the plea agreement was material for *Brady* purposes and thus has failed to establish the prejudice required to excuse his procedural default.

i. Cause / Suppression

The suppression issues turns on whether the plea agreement with Doubs in her unrelated case was within the materials that the Pennsylvania Attorney General had a duty to disclose to Johnson in his case. Although it is a close question, the Court finds that Johnson's prosecutor had a duty to disclose the plea agreement.

As an initial matter, several facts are clearly established from the record in this case, including

the Court of Common Pleas' opinion on Johnson's first PCRA petition, the testimony of Doubs and Johnson's prosecutor, and the transcripts of Johnson's and Doubs' proceedings: (1) Doubs negotiated her plea agreement solely with the county prosecutor; (2) the plea agreement was the result of weaknesses in the charges against Doubs and was unrelated to her testimony at Johnson's trial; (3) there was no negotiation or deal of any kind between Johnson's prosecutor and Doubs regarding her testimony [20]; and (4) Johnson's

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[20] Johnson repeatedly refers to an "implicit understanding" that Doubs would be rewarded for her testimony. This is pure speculation on Johnson's part. The record is entirely devoid of any support for this suggestion despite the fact that Court allowed Johnson to conduct a searching inquiry of the files of the Pennsylvania Attorney General, the Dauphin County District Attorney, and the Harrisburg Bureau of Police aimed at uncovering evidence of such an agreement. The record in this case, and the lack of the "smoking gun" which Johnson hoped to find through discovery, clearly demonstrate that there was no agreement – explicit, implicit, or otherwise

prosecutor was unaware of the Doubs' plea agreement at the time of trial. These facts, however, do not remove the plea agreement from the category of materials that Johnson's prosecutor had a duty to disclose.

"There is no question that the government's duty to disclose under *Brady* reaches beyond evidence in the prosecutor's actual possession." *United States v. Risha*, 445 F.3d 298, 303 (3d Cir. 2006). Prosecutors have "a duty to learn of any favorable evidence known to others acting on the government's behalf in the case." *Id.* (citing *United States v. Giglio*, 405 U.S. 150, 154 (1972) and quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). Prosecutors are thus charged with "constructive knowledge" of *Brady* material, that is material of which the prosecutor knew or should have known

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– between Doubs and any prosecutor to reward Doubs in any way for her testimony.

even though developed in another case. *Id.* (citing *United States v. Joseph*, 996 F.2d 36, 39 (3d Cir. 1993)). The Third Circuit has discussed the scope and bounds of such constructive knowledge in several relevant cases.

In *United States v. Perdomo*, 929 F.3d 967 (3d Cir. 1991), the court found a *Brady* violation where the prosecutor failed to disclose the criminal background of prosecution witnesses. The prosecutor in that case checked the National Crime Information Center database for criminal records, but failed to check local Virgin Island records. The court found that the prosecutor's failure to uncover and disclose information contained in the local records violated *Brady* because the information was "readily available" to the prosecutor. *Id.* at 970. The court explained that "the availability of information is not measured in terms of whether

the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state." *Id.* at 971.

In *Joseph*, the defendants argued that the prosecutor violated due process by failing to disclose exculpatory information that was in the file of an unrelated case he was also prosecuting. The court rejected this argument, holding that "where a prosecutor has no actual knowledge or cause to know of the existence of *Brady* material in a file unrelated to the case under prosecution, a defendant, in order to trigger an examination of such unrelated files, must make a specific request for that information – specific in the sense that it explicitly identifies the desired material and is objectively limited in scope." *Joseph*, 996 F.2d at 41. The court found that the defendants had made only a general request for *Brady* materials and

therefore "it would have been unreasonable to expect the prosecutor to search all the unrelated files in his office to look for exculpatory material." *Id.* at 40.

In *United States v. Thornton*, 1 F.3d 149 (3d Cir. 1993), the court held that two letters from the DEA detailing payments to two government witnesses fell within the *Brady* disclosure rule despite the fact the federal prosecutors were unaware of the payments. The court stated that "prosecutors have an obligation to make a thorough inquiry of all enforcement agencies that have a potential connection with their witnesses." *Id.* at 158. While they had requested DEA agents to advise them of any such payments, the prosecutors did not follow up after the DEA failed to respond, and therefore did not fulfill their *Brady* disclosure obligations. *Id.*

In *United States v. Pelullo*, 399 F.3d 197 (3d

Cir. 2005), the court held that the government did not violate *Brady* by failing to disclose documents found within 160 boxes and 36 file cabinets of documents collected by the defendant over twenty years. The court focused on (1) the respective knowledge of the parties; (2) the defendant's access to the documents; and (3) the government's representations. *Id.* at 211. The court noted that the government was unaware of the exculpatory nature of the documents whereas the defendant possessed such knowledge because he had generated the documents. *Id.* at 211-12. Further, the government made the documents available to the defendant and his attorneys for copying and inspection. *Id.* at 212. The court stated that "[o]ur jurisprudence has made clear that *Brady* does not compel the government to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." *Id.* at

213 (quoting *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir.1984)). The court noted that "[i]t is equally clear, however, that defense counsel's knowledge of, and access to, evidence may be effectively nullified when a prosecutor misleads the defense into believing the evidence will not be favorable to the defendant." *Id.* But the court found no such reliance, and in any event, held that the defendant's access to his own documents precluded a finding of a *Brady* violation since "defense knowledge of, or access to, purportedly exculpatory material is potentially fatal to a *Brady* claim, even where there might be some showing of governmental impropriety." *Id.* at 213-15.

Also at issue in *Pelullo* was whether the prosecutors should be charged with constructive knowledge of documents in the possession of the Pension and Welfare Benefits Administration ("PWBA"), a part of the Department of Labor. The

court acknowledged that "*Brady* places an affirmative obligation on prosecutors 'to learn of any favorable evidence known to the others acting on the government's behalf in the case,'" *id.* at 216 (quoting *Kyles*, 514 U.S. at 437), but stated that *Brady* does not "impos[e] a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue," *id.* (quoting *United States v. Merlino*, 349 F.3d 144, 154 (3d Cir. 2003)). "Applying the general principle ... that the prosecution is only obligated to disclose information known to others acting on the government's behalf in a particular case," the court concluded that there was no "constructive knowledge" because there was no reason to believe that the PWBA was acting on behalf of the prosecution, no indication that the PWBA and the prosecution were engaged in a joint investigation or

that they otherwise shared labor and resources, and no indication that the prosecution had any sort of control over the PWBA officials. *Id.*

Finally, at issue in *Risha* was whether federal prosecutors had a duty to disclose that, unbeknownst to them, their key witness expected consideration for testifying against the defendant and that his testimony in fact helped him to secure a favorable plea agreement in unrelated state charges pending against him. The court noted that in addressing the issue of cross-jurisdiction constructive knowledge, courts should look to: (1) whether the party with knowledge of the information is acting on the government's behalf or is under its control; (2) the extent to which the two jurisdictions are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the entity charged with constructive possession has ready access to the evidence. *Risha*,

445 F.3d at 304. The Third Circuit remanded the case so that the district court could make these factual determinations.

Allegations of a "constructive" *Brady* violation present a difficult task for the court, *Joseph*, 996 F.2d at 39, and like the court in *Pelullo*, we find ourselves at the intersection of several considerations identified in *Brady* jurisprudence, *Pelullo*, 399 F.3d at 213. Respondents correctly point out that with some reasonable diligence, Johnson could have obtained the information regarding Doubs' plea agreement. *See id.* Doubs pled guilty to the robbery charges on February 7, 1997 and was sentenced on March 26, 1997. Johnson filed his direct appeal on April 30, 1998, more than a year later. Johnson's trial counsel, who was also his counsel on appeal, was well aware of the charges pending against Doubs and had more than sufficient time to examine the

public records of Doubs' plea and sentencing before Johnson's direct appeal. In fact, at the hearing on Johnson's first PCRA petition, his counsel testified that she "remember[ed] checking the docket sheet to find out what had happened with [Doubs'] case afterwards and realizing that she got a pretty good sentence on her charges." (Doc. 66-25 at 18.) Johnson thus had at least some knowledge of and access to the purported *Brady* materials, and "defense knowledge of, or access to, purportedly exculpatory material is potentially fatal to a *Brady* claim, even where there might be some showing of governmental impropriety."[21] *Pelullo*, 399 F.3d at 215.

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[21] These facts also buttress the Superior Court's determination that Johnson waived his *Brady* claim before the state courts. Because he had knowledge of and access to the information that forms the basis for his *Brady* claim well before his direct appeal, Johnson "could have" raised the claim on appeal "but failed to do so" under 42 Pa. C.S.A. § 9544(b).

Also militating against imputing constructive knowledge of the plea agreement to Johnson's prosecutor is the lack of control over the county prosecutor by the Pennsylvania Attorney General. *See Risha*, 445 F.3d at 304; *Pelullo*, 399 F.3d at 218. There is no indication that Johnson's prosecutor was involved in any way with the negotiation of Doubs' plea agreement. The county prosecutor independently agreed to the deal with Doubs solely because of weaknesses in the case against her, not at the behest of the Attorney General's Office or for any reason related to Johnson's prosecution.

Several other factors, however, outweigh these considerations and tip the balance in favor of charging Johnson's prosecutor with constructive knowledge of the Doubs plea agreement. First, the plea agreement was readily available to the prosecution. *See Risha*, 445 F.3d at 304, *Perdomo*,

929 F.3d at 970-71. Johnson's prosecutor was certainly aware of the charges pending against Doubs and had access to and contact with his witness prior to trial. Although he did not have actual knowledge of the plea agreement, Johnson's prosecutor had ready access to such information. Second, although it is clear that the Attorney General did not control Doubs' prosecution, there is some indication of coordination between the two prosecutors. Johnson's case was handled, at least initially, by the Dauphin County District Attorney, and in fact, the same attorney that entered into the plea agreement with Doubs represented the government at Johnson's preliminary hearing. (*See* Doc. 66-25 at 22; Doc. 66-27 at 18.) Doubs' prosecutor continued to follow Johnson's case, and should have been aware of the potential impact of Doubs' plea agreement on Johnson's prosecution. (*See id.* at 20-21.) Thus, unlike other cases

involving a lack of coordination between government agencies, in this case, the two prosecutors were both involved, to some degree, in Johnson's prosecution, and their authority overlapped to some extent. *See Pelullo*, 399 F.3d at 216-17 & n.21; *see also Strickler*, 527 U.S. at 275 n.12.

Most importantly, Johnson was entitled to rely on the government's representations that it had disclosed all *Brady* material. *See Banks*, 540 U.S. at 692-94; *Strickler*, 527 U.S. at 284-85; *Pelullo*, 399 F.3d at 213. Johnson's trial counsel inquired of the prosecution whether Doubs had been offered any plea negotiation (Doc. 66-25 at 18-19), thus triggering the prosecution's duty to search even an unrelated file for such information. *See Joseph*, 996 F.2d at 41. The prosecutor represented that no negotiations had taken place with Doubs and no plea agreement had been

offered to her. (Doc. 66-25 at 18-19.) Further, Johnson's prosecutor maintained an open file policy, implicitly representing that all *Brady* materials would be included in the open file.[22] *Strickler*, 527 U.S. at 283-84. The reasonable access that Johnson's counsel may have had to information about Doubs' plea is nullified by her reasonable reliance on the government's representations that it had met its *Brady* obligation.[23] *See Pelullo*, 399 F.3d at 213; *see also*

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[22] The Respondents argue that the prosecutor's open file policy weighs against a finding of suppression, but the Supreme Court has made clear that "if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*." *Strickler*, 527 U.S. at 283 n.23; *see also Banks*, 540 U.S. at 693 (noting *Strickler* holds that "an open file policy is one factor that explains why trial counsel did not advance a *Brady* claim").

[23] The Supreme Court has explicitly left unaddressed "the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discovered, how to obtain them," *Strickler*, 527 U.S. 288 n.33, but the Third Circuit has held that "defense counsel's knowledge of, and access to, evidence may be effectively nullified when a prosecutor misleads the

Banks, 540 U.S. at 695-96; *Strickler*, 527 U.S. at 284-85. This is so even though Johnson's counsel may have learned of the plea agreement in time to raise it on direct appeal. *See Strickler*, 527 U.S. at 284 ("If it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel appointed to represent

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defense into believing the evidence will not be favorable to the defendant," *Pelullo*, 399 F.3d at 213. While we do not characterize the government's actions here to be "misleading," the prosecution's representations vitiate the impact of any access Johnson's counsel may have had to the plea agreement. Further, the government has not demonstrated that Johnson's counsel had actual knowledge of the plea agreement, but merely that she had reasonable access to such information. If the effect of access plus knowledge may be nullified by the government's representations of compliance with its *Brady* obligation, then the effect of access alone is certainly outweighed by the government's representations in this case.

petitioner in state habeas proceedings was equally reasonable. Indeed, in *Murray*, [477 U.S. at 491] we expressly noted that "the standard for cause should not vary depending on the timing of a procedural default."). Finally, Doubs' testimony at trial – that *Johnson's* prosecutor had made no agreement with her regarding her pending charges – while literally true, was not expanded upon by the prosecution to explain that *Doubs'* prosecutor had in fact offered her a plea agreement, and thus served to confirm Johnson's reliance on the government's representations. *See Banks*, 540 U.S. at 693-94; *Strickler*, 527 U.S. at 287.

In sum, the Court finds that Johnson had sufficient cause for failing to raise his *Brady* claim in accordance with state procedural rules for reasons quite analogous to those identified by the Supreme Court in *Banks* and *Strickler*. The

prosecution withheld favorable evidence; Johnson reasonably relied on the government's open file policy and other representations that it had fulfilled its duty to disclose such evidence; and this reliance was confirmed by Doubs' trial testimony. *See Banks*, 540 U.S. at 693; *Strickler*, 527 U.S. at 289.

ii. **Prejudice / Materiality**

While Johnson has shown that the suppression of Doubs' plea agreement provided cause for his failure to comply with Pennsylvania procedures, he has not demonstrated that the plea agreement was material so as to excuse his procedural default. "Unless suppressed evidence is material for *Brady* purposes, its suppression does not give rise to sufficient prejudice to overcome a procedural default." *Banks*, 540 U.S. at 698 (quoting *Strickler*, 527 U.S. at 282).

The touchstone on materiality is *Kyles v. Whitley*, 514 U.S. 419 (1995). *Id.* In *Kyles*, the Supreme Court stated that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)." 514 U.S. at 434 (citing *United States v. Bagley*, 473 U.S. 667, 680, 682, 685 (1985)). Rather, the petitioner must show "a reasonable probability of a different result." *Id.* The Court explained that "the adjective is important":

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a

> verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. (quoting *Bagley*, 473 U.S. at 678). "The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (quoting *Kyles*, 514 U.S. at 434-35).

In this case, the Court cannot find that a different verdict would have been reasonably

probable if the Doubs plea agreement had been presented to the jury. While Johnson could have used the plea agreement as impeachment evidence on cross-examination of Doubs, this evidence would not have been effective at impeaching her credibility. Doubs pled guilty to unrelated charges in an unrelated case. The plea agreement was negotiated with a different prosecutor from a different government agency, and most importantly, and had nothing to do with her testimony at Johnson's trial. Had the plea agreement been disclosed, Johnson's trial counsel would have been able to ask Doubs whether she received the plea agreement in exchange for her testimony.[24] The answer, however, would have

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[24] In fact, Johnson's counsel may not have ever asked this question. Had Johnson's

been a resounding "no", and the jury would have had before it precisely the same testimony as was actually presented at trial: Doubs was not offered any deal in exchange for her testimony.

Further, any attempt to impeach Doubs through questions about the plea agreement would have been largely cumulative. Doubs testified while wearing a prison uniform and stated that she came to court from Dauphin County Prison. She admitted to a prior conviction for forgery and that she was currently incarcerated on a robbery conviction. Doubs also admitted that she dealt and

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prosecutor known of the plea agreement at the time of trial, he likely would have asked Doubs on direct examination to confirm that she received nothing in exchange for her testimony, as he did with several other prosecution witnesses (*See, e.g.*, N.T. 116, 183), thereby undermining the effect of any such line of questioning from defense counsel.

used illegal drugs. She stated that on the day of the murder, she woke up in a house with Walker and Johnson around 11:00 a.m. and followed her "usual routine" of buying some marijuana, smoking a "blunt," and "talking trash" in front of the Kentucky Fried Chicken. Finally, Doubs admitted that she initially lied to police during their investigation of the incident in exchange for someone paying her bail. Doubs' credibility had already been severely impeached, and the inclusion of evidence regarding her plea agreement would have added little to this cause.

Finally, even if Doubs' testimony had been further discredited, the jury might still have reached the same verdict. Although, as the county prosecutor indicated at her sentencing, Doubs's

testimony was "very relevant," Doubs was not the prosecution's key witness. Doubs did not witness or testify about the killing or any of the events leading directly thereto. Her testimony focused almost exclusively on the actions of the defendants more than twelve hours prior to the murder. While this testimony provided a motive for the defendants' actions, as Johnson notes, motive alone in insufficient to support a murder conviction. The only testimony that Doubs gave regarding the murder itself – that Carla Brown was involved in the killing – actually served to undercut the testimony of Brown, the prosecution's most important witness. A lack of additional evidence impeaching Doubs' credibility thus, in fact, benefitted Johnson to the extent that the jury was

more likely to believe the portion of her testimony which impeached the prosecution's crucial witness.

In summary, the Court finds that the limited and cumulative effect of evidence regarding Doubs' plea agreement does not "put the whole case in such a different light as to undermine confidence in the verdict." While the prosecution had a duty to disclose the plea agreement to Johnson, its failure to meet this obligation had little to no effect on the outcome of the trial. Johnson has failed to demonstrate that the suppression of the plea agreement was material for *Brady* purposes and thus failed to show the actual prejudice required to excuse the procedural default of his *Brady* claim. Johnson's second habeas claim will therefore be dismissed with prejudice. *See Lines v. Larkins*,

208 F.3d 153, 155 (3d Cir. 2000).

C. Ineffective Assistance Claim

Johnson's final habeas claim is that his trial counsel was ineffective for failing to object to the trial court's jury instructions and request other instructions regarding Carla Brown's drug use and prior inconsistent statements. The Respondents counter that the trial court's instructions on witness credibility adequately addressed Brown's credibility and that Johnson's counsel was therefore not ineffective for failing to object or request other instructions. The Court agrees with the Respondents that the Court of Common Pleas' jury instructions sufficiently instructed the jury on evaluating Brown's credibility and that Johnson's counsel was not ineffective for failing to object to these instructions or request other instructions.

1. **Background**

Johnson notes that Brown's testimony established that at first, she intentionally lied to the police about the killing and that she was a drug user who was high on cocaine on the night of the incident. Johnson argues that his trial counsel, therefore, should have requested Pennsylvania Suggested Standard Criminal Jury Instructions ("PSSCJI") regarding a witness's inconsistent statements and drug use. [25]

Specifically, Johnson argues that his counsel should have requested PSSCJI 4.08A regarding inconsistent statements, which

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[25] Johnson also argues that his trial counsel was ineffective for failing to request a jury instruction regarding Brown's role as a potential accomplice, but concedes that this claim was not raised before the state courts and accordingly is unexhausted and defaulted. Johnson does not attempt to argue cause and prejudice for this default and explicitly does not raise this claim as a ground for relief, but merely as "evidence that counsel clearly was not paying particularly close attention to the critical

provides:

> 1. You have heard evidence that a witness, [name of witness], made a statement on an earlier occasion that was inconsistent with [his] [her] present testimony. [First Alternative]
>
> 2. You may, if you choose, regard this evidence as proof of the truth of anything that the witness said in the earlier statement. You may also consider this evidence to help you judge the credibility and weight of the testimony given by the witness at this trial.
>
> [Second Alternative]
>
> 2. You may consider this evidence for one purpose only, to help you judge the credibility and weight of the testimony given by the witness at this trial. You may not regard evidence of an earlier inconsistent statement as proof of the truth of anything said in that statement.
>
> [3. When you judge the credibility and weight of testimony, you are deciding whether you believe the testimony and how important you think it is.]

Pa. Suggested Standard Crim. Jury Instructions,

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issue of jury instructions." (Doc. 33 at 38-39 & n.5.)

4.08A (2005).

Johnson also argues that, in light of Brown's drug use, his counsel should have request PSSCJI 4.17, which provides in relevant part:

> 1. As judges of the facts, you are sole judges of the credibility of the witnesses and their testimony. This means you must judge the truthfulness and accuracy of each witness's testimony and decide whether to believe all or part or none of that testimony. The following are some of the factors that you may and should consider when judging credibility and deciding whether or not to believe testimony:
>
> a. Was the witness able to see, hear, or know the things about which [he] [she] testified?
>
> b. How well could the witness remember and describe the things about which [he] [she] testified?
>
> [c. Was the ability of the witness to see, hear, know, remember, or describe those things affected by youth, old age, or by any physical, mental, or intellectual deficiency?]
>
> f. How well does the testimony of the witness square with the other

> **evidence in the case, including the testimony of other witnesses? [Was it contradicted or supported by the other testimony and evidence? Does it make sense?]**

Pa. Suggested Standard Crim. Jury Instructions, 4.17(1)(a)-(c), (f) (2005).

During its jury instructions, the Court of Common Pleas provided the following instructions on witness credibility:

> **You as the judges or the finders of fact, the judges of fact, it's exclusively for you, your providence, to determine the facts in the case. And you've been told this over and over again. You determine the facts in the case by listening to the witnesses as they are presented to you on the stand. And in judging the credibility of a witness, you just use your good old-fashioned common sense. But the law says there's some things you can look at. This is by no means an exhaustive list. It's just a list that they suggest, the law suggests, that you look at. You can look at somebody's interest in the outcome of the case; are they related to parties in the case, any particular bias or prejudice that they may have toward one side or another.**

You can look at their ability to see things and what they described occurred, were they in a position to see that.

You may look at their ability to recall, their mannerisms on the stand, all those things that you do every day in your own affairs. When someone comes up to you and presents a particular position or tells you a particular fact, you factor that in your own mind from your everyday common experience. And that's what you do here. And I'm not going to say any more about credibility.

But let me tell you, the law also says that in some ways in this case, you can fit the evidence together. It meshes together. *Some of the stories are similar and can be pieced together. But in some of the testimony in this case, that can't be done. And you, as the finder of fact, have to determine which side you're going to come down on. Am I more convinced by this evidence or more convinced by evidence in contradiction to that? You have to resolve that conflict in the evidence.*

There's a principle that says that if someone intentionally takes the stand and lies about a particular fact, you're free to disregard their entire testimony. That's if you find that

someone intentionally lied when they took the stand. It is not uncommon in cases, in almost any case, a criminal case or a civil case, that *you'll hear witnesses testify over a period of time and repeatedly and that there may be some variance in detail* or some minor fact that occurs that really is not significant to the case. That's something for you to consider. But that doesn't mean they intentionally lied about something.

So you have to determine, if there are differences, are they of such significance or such major import that it would affect their credibility, or did they intentionally lie about that, or is that just some minor variance as it relates to the passage of time and people's perception of what they see? We all watch athletic events or any event, and we can see instant replays. And that helps, when you watch something three or four times, in determining what took place and the facts.

You don't have that in real life. You have real people who are on the streets, who see something, who at the time the crime or whatever may occur may not even be significant to them. Then they're called in here sometime later and expected to recall great detail. But that's something for you to consider in judging the entire

credibility of a witness.

> One of the witnesses in this case, I believe it was agreed upon that they had a prior record for a crime of forgery. Forgery is a crime involving dishonestly. It involve uttering a false document. The fact that someone has been convicted of forgery, that doesn't mean they're intentionally lying, but it's a factor for you to consider, saying their background here demonstrated that they were convicted of a crime that involves dishonesty. It's a factor for you to consider along with all the other factors. So I point that out to you.
>
> It doesn't mean they're a bad person or not worthy of belief. It's just a factor for you to consider in terms of judging credibility.

(Doc. 66-23 at 28-30 [emphasis added]).

2. State-Court Decisions

Johnson presented his ineffective assistance claim in his first PCRA petition. The Court of Common Pleas rejected this claim, holding that the jury instruction was adequate, and therefore, counsel was not ineffective for failing to object.

The court noted that Pennsylvania courts are not bound by the suggested standard jury instructions, which are only guides. (Doc. 33-2 at 78.) The court determined that its instruction was "adequate, accurate and clear as to issues of both general credibility and consideration of the effect of a prior inconsistent statement," and therefore that the "charge, in combination with trial counsel's vigorous arguments on the issues of Brown's lack of credibility and prior inconsistent statement, made it unnecessary for counsel to object." (*Id.* at 80.)

Johnson again pressed his claim on appeal to the Superior Court. After reviewing the trial court's jury instruction, that court also rejected Johnson's ineffective assistance claim, relying on the reasoning of the Court of Common Pleas. (Doc. 33-2 at 98.)

3. Legal Standard

The Sixth Amendment guarantees criminal

defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). A defendant alleging ineffective assistance must satisfy the familiar two-part test set forth in *Strickland*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. To show deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness ... under prevailing professional norms." *Id.* at 687-88. "Judicial scrutiny of counsel's performance must be highly deferential ... [and] a court must indulge a strong presumption that counsel's

conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. To prove prejudice, the defendant must show that counsel's deficient performance "actually had an adverse effect on the defense." *Id.* at 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

4. Analysis

The Pennsylvania courts' decisions rejecting Johnson's ineffective assistance claim are not contrary to, and do not involve an unreasonable application of, this clearly established Federal law. The credibility instructions provided by the trial

court accurately instructed the jury of its duties in evaluating Brown's testimony. Those instructions adequately accounted for Brown's drug use by instructing the jury to consider a witness's ability to perceive the things she described and ability to recall. The instructions properly considered Brown's prior inconsistent statements by informing the jury that they could disregard a witness's testimony completely if she lied on the witness stand and instructing the jury to consider contradictions between testimony as well as differences in a witness's own statements at different times in evaluating credibility. Under Pennsylvania law, a trial court commits no error by failing to use the non-binding suggested instructions where, as here, the court gives a comprehensive and clear explanation of the factors the jury should consider when deciding witness credibility. *Commonwealth v. Ragan*, 743 A.2d 390,

398 (Pa. 1999). As the Pennsylvania courts found, the trial court's instructions were adequate, accurate, and clear, and therefore, Johnson's counsel had no grounds on which to object to them. Further, the trial court's instructions encompassed the points contained in the suggested instructions relied on by Johnson, and therefore, his counsel had no grounds on which to request those instructions.

Johnson argues that the suggested standards provide "much stronger" jury instructions on credibility that his counsel should have requested, but whether counsel's performance could have been stronger is not the relevant question on an ineffective assistance claim. The proper inquiry is whether counsel's performance fell below an objectively reasonable standard. Johnson's counsel was not objectively unreasonable for failing to object to the adequate and accurate

jury instructions provided by the trial court. Johnson's ineffective assistance claim will therefore be denied.

V. CERTIFICATE OF APPEALABILITY

Under Federal Rule of Appellate Procedure 22(b), the petitioner in a habeas corpus proceeding cannot take an appeal unless a certificate of appealability ("COA") is issued pursuant to 28 U.S.C. § 2253(c). Section 2253(c) provides that a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Where the district court addresses the merits of a petitioner's claim, to obtain a COA, "a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further."

Miller-El, 537 U.S. at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). "A prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part." *Id.* at 338 (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). However, "a COA does not require a showing that the appeal will succeed" and a petitioner need not prove "that some jurists would grant the petition for habeas corpus." *Id.* at 337, 338. "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 338 (quoting *Slack*, 529 U.S. at 484).

"When the district court denies a habeas petition on procedural grounds without reaching

the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. This test has two components – "one directed at the underlying constitutional claims and one directed at the district court's procedural holding" – both of which must be met before a COA will issue. *Id.* at 484-85.

Johnson's sufficiency of the evidence claim will be denied on the merits. Although the somewhat unsettled state of the law regarding the "fair presentation" issue addressed at length above may lead some reasonable jurists to debate the Court's procedural ruling, the merits of

Johnson's first habeas claim, when analyzed under the requisite governing standard, do not present an outcome that would be debatable among reasonable jurists. Accordingly no COA will be issued as to this claim.

Johnson's *Brady* claim will be denied as procedurally defaulted, and therefore, the question of whether to issue a COA must be determined under the "more complicated" two-part test set forth in *Slack*, 529 U.S. at 484. The inquiry in this case is somewhat further complicated by the fact that the Court's procedural ruling necessarily addressed the underlying constitutional claim because the "cause and prejudice" analysis meshed with merits of the *Brady* claim. Johnson's *Brady* claim was clearly procedurally barred in the state courts, and the state procedural rule relied on by the Pennsylvania courts has been consistently found to be an independent and adequate state-law

ground. The question of cause (*i.e.* suppression) is a close one, but is resolved in Johnson's favor. The question of prejudice (*i.e.* materiality), however, is much less in doubt. Therefore, Johnson's second habeas claim does not clear the "reasonably debatable" threshold of § 2253(c) and no COA will be issued as to this claim.

Finally, Johnson's ineffective assistance of counsel claim will be denied on the merits, and no reasonable jurist would find the Court's assessment of this claim debatable or wrong. No COA will issue as to this claim.

VI. CONCLUSION

For the foregoing reasons, Johnson's petition for a writ of habeas corpus pursuant to § 2254 will be denied. Johnson's claims based on the alleged insufficiency of the evidence and ineffective assistance of counsel are denied on their merits. Johnson's *Brady* claim is

dismissed with prejudice as procedurally defaulted. No certificate of appealability will be issued as to any claim. An appropriate order, in accordance with this memorandum, shall be entered.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LORENZO JOHNSON, Petitioner	:No. 4:04-CV-1564
	: Judge John E. Jones III
v.	:
NEAL MECHLING, *et. Al* Respondents	:

ORDER
March 31, 2008

In accordance with the Memorandum entered on this date, IT IS HEREBY ORDERED THAT:

1. Petitioner Lorenzo Johnson's Petition for Writ of Habeas Corpus (Doc. 1) is DENIED;

2. A certificate of appealability is DENIED; and

3. The Clerk of the Court is direct to CLOSE this case.

/s John E. Jones III
John E. Jones III

Appendix F

J. S55016/98

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	No. 847 Harrisburg 1997
LORENZO JOHNSON, Appellant	:	

Appeal from the Judgment of Sentence, March 17, 1997, in the Court of Common Pleas of Dauphin County Criminal Division, No. 1544 CD 1996

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	No. 909 Harrisburg 1997
COREY WALKER, Appellant	:	

Appeal from the Judgment of Sentence, March 17, 1997, in the Court of Common Pleas of Dauphin County Criminal Division, No. 2739 CD 1996

BEFORE: POPOVICH, FORD ELLIOTT, AND SCHILLER, JJ.

MEMORANDUM: Filed Sep 28 1998

Lorenzo Johnson and Corey L. Walker appeal from the judgments of sentence imposed March 17, 1997, in the Court of Common Pleas of Dauphin County. Appellants ask this court to determine whether the verdict was supported by sufficient evidence, and whether the verdict was against the weight of the evidence. We affirm.

On March 13, 1997, appellant and his co-defendant, Corey Lamont Walker, proceeded to a jury trial on the charges of criminal homicide and criminal conspiracy. The pertinent facts were set forth in the trial court opinion of Judge Todd A. Hoover.

> The victim, Taraja Williams, was shot and killed in an alley in the 1400 block of Market Street in Harrisburg, Dauphin County during the early morning hours of December 15, 1995. Laura Davis, a patrol officer with the Harrisburg Bureau of Police, was patrolling that area on December 15, 1995 when she heard a very loud

booming sound. (N.T.45). She tried to determine the origin of the sound and did not notice anyone running from the crime scene. (N.T.47). She drove around the neighborhood, talked to someone outside the Midnight Special Bar which is located on Fourteenth Street in Harrisburg and was told that the shot came from Market Street. (N.T. 49). Finally, she discovered the victim who was laying on the ground between two houses in an alley off of Market Street. (N.T.51). A partial shotgun was found near the victim by Officer Leroy Jones of the Harrisburg Police Deapartment. (N.T.71). The barrel was missing from this shotgun. (N.T.71). Carla Brown testified that she was in the Midnight Special bar during the evening of December 14 and the early morning of December 15, 1995. (N.T. 100). She noticed that the defendant, Corey Walker, was in the bar that night and that he was arguing with the victim. (N.T. 101). She stated that the defendant, Lorenzo Johnson, was present as well. (N.T. 102). She saw the three men arguing and stated that the bouncer told them that they had to leave. (N.T. 103). This testimony was corroborated by the owner of the bar's son, Gary Miller, Jr., who told Corey Walker and the victim to leave the bar. (N.T.92-93). Carla followed Corey,

Lorenzo and Taraja after they left the bar. (N.T. 104). They walked single file with Taraja between Corey and Lorenzo and turned into an alley. (N.T. 106). The victim knew that Carla was following them and he told her to go ahead of them. (N.T. 107). She passed them and later heard a loud boom sound. (N.T. 110). Aaron Dews testified that he was working the night of the incident at Vision Youth Works as a house advisor. (N.T. 157). Shortly after 12:45 a.m. on December 15, 1995, he heard a loud boom and when he looked out the window he saw two silhouettes running up the driveway. (N.T. 160). Brian Ramsey, a good friend of the victim, testified that he was with Taraj a when Taraja left with two other men (N.T. 174). One person was walking with a limp. (N.T. 176). After Taraja was shot, Mr. Ramsey saw Corey Walker and Lorenzo Johnson and stated that they seemed stunned to learn that Taraja was killed. (N.T. 178-179). Victoria Doubs testified that she was with Lorenzo and Corey on the morning of December 14,1995. (N.T.214). They were at the Kentucky Fried Chicken restaurant on Market Street on the morning of December 14, 1995. (N.T.216). Taraja Williams approached and Corey Walker indicated that he had to go and yell at

Taraja about some money that Taraja owed Corey .. (N.T. 217). Taraja yelled that Corey would get his money when he felt like it and a fight erupted in front of the Kentucky Fried Chicken. (N.T.218). Taraja beat Corey with a broomstick. (N.T.218). Victoria stated that Corey was really mad that he was beaten by a crackhead. (N.T.220). She testified that Corey continued to say that he was going to kill the crackhead (Taraja). (N.T. 221-222). Lorenzo Johnson presented the testimony of Suquan Ripply who stated that at 4:00 p.m. on December 14, 1995; he and Lorenzo Johnson left Harrisburg for New York City and arrived in New York at 9:00 p.m. that same evening. (N.T.260-261). Eric Chambers testified on behalf of Lorenzo Johnson that he was in the Midnight Special bar on the night of the incident and that he saw Taraja in the bar arguing with gentlemen who he did not recognize. (N.T.298). He stated that he did not recall seeing Lorenzo in the bar that evening but that he remembered seeing Corey Walker after the shooting. (N.T.299-301). Lashawnyn Jackson testified on behalf of Corey Walker and she stated that Corey Walker was at the Midnight Special bar with her the entire night of the shooting, that he did not have any argument with Taraja at the bar and

> that both were in the bar when they received the news of Taraja's death. (N.T.315).

Trial court opinion, 8/25/97 at 1-3.

The jury returned guilty verdicts to first degree murder and criminal conspiracy on March 17, 1997. Consequently, Judge Hoover" imposed a mandatory sentence of life imprisonment on both Lorenzo Johnson and Corey Walker. Appellants filed post-sentencing motions on March 27, 1997, arguing that the verdict was not supported by sufficient different evidence, and was against the weight of the evidence. The trial court denied these motions by order of court dated August 25, 1997. These timely appeals followed.

Appellants challenge the sufficiency of the evidence. Specifically, appellants contend that of the three Commonwealth witnesses who place them close to the scene of the crime, only witness

Carla Brown was able to identify the two individuals who entered the alley with the victim. Appellants further argue that witness Carla Brown did not actually see the shooting, nor did she testify that appellants participated in the shooting. It is appellants' contention that this evidence was insufficient to prove that appellants were co-conspirators in the murder. We disagree.

In addressing a challenge to the sufficiency of the evidence, this court must view the evidence admitted at trial in the light most favorable to the Commonwealth, as verdict winner, and draw all reasonable inferences therefrom. *Commonwealth v. Glover*, 399 Pa.Super. 610,582 A.2d 1111 (1990). We note that circumstantial evidence alone is sufficient to convict one of a crime, including first degree murder. *Commonwealth v. May*, 540 Pa. 237, 656 A.2d 1335 (1995). Reviewing the facts with

that standard in mind, we conclude that sufficient evidence was presented to support the jury's verdict. The various witnesses' testimony revealed that Lorenzo Johnson, Corey Walker, and the victim were arguing inside the Midnight Special Bar and were told to leave. The trio walked out, with the victim between Lorenzo Johnson and Corey Walker. They proceeded into an alley, and a shot was heard. Two men were observed fleeing the scene, and the victim's body was discovered in the alley. Presented with this evidence, the jury had a sound basis upon which to conclude that a conspiracy existed between Lorenzo Johnson and Corey Walker to murder Taraja Williams.

Next, appellants maintain that the verdict was against the weight of the evidence. Once again, appellants contend that only three ,Commonwealth witnesses were presented with any personal

knowledge of the events on the night in question. Appellants argue that the rendition of events given by each of these "three witnesses was inconsistent to the extent that none of the witnesses could be deemed credible. The inconsistencies flagged by appellant Johnson involve differing clothes descriptions of the actors and the victim, as recalled by the witnesses Brown and Ramsey, and the witness Doubs refuting witness Brown's statement that she never spoke to anyone except the police about the incident. Appellant Walker focuses on witness Brown's lack of credibility, because she "didn't have a job" and was a cocaine addict. We determine that these inconsistencies do not compromise the jury's verdict.

In order to conclude that the verdict was against the weight of the evidence:

> it must be clear from the record that the verdict shocks this Court's sense of

> justice. . .. Where the evidence is conflicting, it" is "the province of the fact finder to determine credibility; it is the prerogative of the fact finder to believe all, part or none of the evidence presented; . . The determination of whether to grant a new trial because the verdict is against the weight of the evidence rests within the discretion of the trial court and we will not disturb that decision absent an abuse of discretion.

Commonwealth v. Hlatky, 426 Pa.Super. 66, _, 626 A.2d 575, 580 (1993) (citations omitted). *See also Commonwealth v. Brown*, 538 Pa. 41 __ , 648 A.2d 1177, 1189 (1994) ("[I]t is the duty of an appellate court to give the gravest consideration to the findings and reasons advanced by the trial judge.").

Additionally, this court has held that "[t]he mere fact that there are some inconsistencies in a witness' testimony is not alone sufficient to destroy the Commonwealth's case," even where the victim is the only witness who can connect the appellant

to the crime. ***Commonwealth v. Curry,*** 318 Pa.Super. 490, ___, 465 A.2d 660, 662 (1983) (citations omitted).

Instantly, the jury resolved the inconsequential conflicts between the various witnesses in favor of the Commonwealth. They were free to do so. The verdicts based upon the testimony of record are not such that they shock one's sense of justice warranting a new trial. ***Hlatky,*** *supra.* Thus, the verdicts will not be disturbed on appeal.

Judgments of sentence affirmed.

Schiller, J. files a Concurring and Dissenting Statement.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	No. 847 Harrisburg 1997
LORENZO JOHNSON, Appellant	:	

Appeal from the Judgment of Sentence, March 17, 1997, in the Court of Common Pleas of Dauphin County Criminal Division, No. 1544 CD 1996

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	No. 909 Harrisburg 1997
COREY WALKER, Appellant	:	

Appeal from the Judgment of Sentence, March 17, 1997, in the Court of Common Pleas of Dauphin County Criminal Division, No. 2739 CD 1996

BEFORE: POPOVICH, FORD ELLIOTT, AND SCHILLER, JJ.

CONCURRING AND DISSENTING STATEMENT: FILED SEP 2 8 1998

I concur with that portion of the Majority's decision which affirms the conviction of Corey Walker for first degree murder of Taraja Williams.

I dissent from that portion of the Majority's decision which upholds the conviction of Lorenzo Johnson for first degree murder and criminal conspiracy as well as the conviction of Corey Walker for criminal conspiracy. I believe that there is no direct evidence, nor can any be inferred, linking defendant Johnson to the death of Taraja Williams nor any agreement with defendant Walker which resulted in Williams' death.

Appendix G

Commonwealth of Pennsylvania,	:	In the Court of Common Dauphin County, Pennsylvania
	:	
v.	:	No. 1544 CD 1996
	:	
Lorenzo Johnson	:	

Commonwealth of Pennsylvania,	:	In the Court of Common Dauphin County, Pennsylvania
	:	
v.	:	No. 1544 CD 1996
	:	
Corey Walker	:	

OPINION

This matter is presently before the court on the defendants' post-sentence motions. The defendants were found guilty on March 17, 1997 by a jury of Murder of the First Degree and Criminal Conspiracy. The defendants were sentenced to a mandatory sentence of life imprisonment immediately following the announcement of the

jury's verdict. The facts as adduced at trial are as follows:

The victim, Taraja Williams, was shot and killed in an alley in the 1400 block of Market Street in Harrisburg, Dauphin County during the early morning hours of December 15, 1995. Laura Davis, a patrol officer with the Harrisburg Bureau of Police, was patrolling that area on December 15, 1995 when she heard a very loud booming sound. (N.T. 45). She tried to determine the origin of the sound and did not notice anyone running from the crime scene. (N.T. 147). She drove around the neighborhood, talked to someone outside the Midnight Special Bar which is located on Fourteenth Street in Harrisburg and was told that the shot came from Market Street. (N.T. 49). Finally, she discovered the victim who was laying on the ground between two houses in an alley off of

Market Street. (N.T. 51). A partial shotgun was found near the victim by Officer Leroy Jones of the Harrisburg Police Department. (N.T. 71). The barrel was missing from this shotgun. (N.T. 71). Carla Brown testified that she was in the Midnight Special bar during the evening of December 14 and the early morning of December 15, 1995. (N.T.100). She noticed that the defendant, Corey Walker, was in the bar that night and that he was arguing with the victim. (N.T. 101). She stated that the defendant, Lorenzo Johnson, was present as well. (N.T. 102). She saw the three men arguing and stated that the bouncer told them that they had to leave. (N.T. 103). This testimony was corroborated by the owner of the bar's son, Gary Miller, Jr., who told Corey Walker and the victim to leave the bar. (N.T.92-93). Carla followed Corey, Lorenzo and Taraja after they left the bar. (N.T. 104). They

walked single file with Taraja between Corey and Lorenzo and turned into an alley. (N.T. 106). The victim knew that Carla was following them and he told her to go ahead of them. (N.T. 107). She passed them and later heard a loud boom sound. (N.T. 110). Aaron Dews testified that he was working the night of the incident at Vision Youth Works as it house advisor. (N.T. 157). Shortly after 12:45 a.m. on December 15, 1995, he heard a loud boom and when he looked out the window he saw two silhouettes running up the driveway. (N.T. 160). Brian Ramsey, a good friend of the victim, testified that he was with Taraja when Taraja left with two other men (N.T. 174). One person was walking with a limp. (I,LT. 176). After Taraja was shot, Mr. Ramsey saw Corey Walker and Lorenzo Johnson and stated that they seemed stunned to learn that Taraja was killed. (N.T. 178-179). Victoria Daubs

testified that she was with Lorenzo and Corey on the morning of December 14, 1995. (N.T.214). They were at the Kentucky Fried Chicken restaurant on Market Street on the morning of December 14, 1995. (N.T. 216). Taraja Williams approached and Corey Walker indicated that he had to go and yell at Taraja about some money that Taraja owed Corey. (N.T.217). Taraja yelled that Corey would get his money when he felt like it and a fight erupted in front of the Kentucky Fried Chicken. (N.T. 218). Taraja beat Corey with a broomstick. (N.T. 218). Victoria stated that Corey was really mad that he was beaten by a crackhead. (N.T. 220). She testified that Corey continued to say that he was going to kill the crackhead (Taraja). (N.T.221-222). Lorenzo Johnson presented the testimony of Suquan Ripply who stated that at 4:00 p.m. on December 14, 1995, he and Lorenzo Johnson left

Harrisburg for New York City and arrived in New York at 9:00 p.m. that same evening. (N.T.260-261). Eric Chambers testified on behalf of Lorenzo Johnson that he was in the Midnight, Special bar on the night of the incident and that he saw Taraja in the bar arguing with gentlemen who he did not recognize. (N. T. 298). He stated that he did not recall seeing Lorenzo in the bar that evening but that he remembered seeing Corey Walker after the shooting. (N.T. 299-301). Lashawnyn Jackson testified on behalf of Corey Walker and she stated that Corey Walker was at the Midnight Special bar with her the entire night of the shooting, that he did not have any argument with Taraja at the bar and that both were in the bar when they received the news of Taraja's death. (N.T.315).

The defendants both argue that the verdicts were insufficient to prove beyond a reasonable

doubt that they were involved in any way with the death of Taraja Williams. In the alternative, the defendants both contend that the verdicts were against the weight of the evidence.

In evaluating a challenge to the sufficiency of the evidence, the court must view all of the evidence admitted at trial in the light most favorable to the Commonwealth as verdict winner and draw all reasonable inferences in. favor of the Commonwealth. Commonwealth v. Cruz-Centeno, 447 Pa. Super. 98, 104, 66B A.2d 536, 539 (1995) appeal denied 544 Pa. 653, 676 A.2d 1195 (1996). The court must then determine whether the evidence was sufficient to permit the trier of fact to find each and every element of the crimes charged was established beyond a reasonable doubt. Id. It is the province of the trier of fact to pass upon the credibility of the witnesses and the weight to be

accorded the evidence produced and the fact finder is free to believe all, part or none of the evidence. Id. A motion for a new trial on grounds that the verdict is against the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but contends that nevertheless, the verdict is against the weight of the evidence. Id. at 107, 668 A.2d at 540. A trial court should award a new trial only when the verdict is so contrary to the evidence to shock one's sense of justice and make the award of a new trial imperative so that right may be given another opportunity to prevail. Id. The weight of the evidence is exclusively for the finder of fact who is free to believe all, part or none of the evidence and to determine the credibility of the witnesses. Id. at 108, 668 A.2d at 541. A court cannot substitute its judgment for that of the fact finder and the fact finder's verdict can only be

reversed if it is so contrary to the evidence as to shock one's sense of justice. Id.

We have reviewed the evidence as outlined above and conclude that the evidence was sufficient to sustain the verdicts and that the verdicts were not against the weight of the evidence. The Commonwealth presented the testimony of Carla Brown who followed the two defendants and the victim in the alley where the victim was ultimately shot. She stated that Corey Walker was walking with a limp and it looked to her as if he was concealing something under his coat. The defendants find it significant that no one saw the victim being shot. No one disputes that there were no witnesses to the actual shooting. Nevertheless, this was argued to the jury very ably by both defense lawyers and it was for the jury to determine whether the circumstantial evidence,

especially the testimony of Carla Brown concerning her observations, was enough to find beyond a reasonable doubt that the defendants were responsible for the victim's death. Victoria Doubs' testimony provided a motive for the defendants' attack. She stated that earlier on the day of the incident, the victim and Corey Walker had an altercation and that the victim embarrassed the defendant in front of his friends and associates. She stated that the defendant repeatedly remarked that he was going to kill the victim. Although both defense counsel tried to discredit this witness' testimony based on her character, prior convictions and current incarceration, it was solely within the province of the jury to determine whether her testimony was credible. Both defendants presented alibi witnesses who testified that they were hot in the vicinity of the shooting at the time of the

incident. Suquan Ripply testified that Lorenzo Johnson was with him in New York at the time of the incident and Corey Walker's girlfriend, Lashawnyn Jackson, testified that Corey was with her at the Midnight Special Bar the entire evening of the incident. Again, it was for the jury to determine whether the purported alibi defenses were meritorious.

We determine that there is no merit to the defendants' post-trial motions and accordingly, we enter the following:

ORDER

AND NOW THIS 25 day of August, 1997, the post-sentence motions filed on behalf of Corey Walker and Lorenzo Johnson are hereby DENIED.

BY THE COURT:

/s Todd A. Hoover
Todd A. Hoover, Judge

Distribution:

John M. Shugars, Esquire, 2459 Walnut Street, Harrisburg, PA 17103
Deanna Wagner, Esquire, Public Defender's Office
E. Christopher Abruzzo, Esquire, Office of Attorney General, Criminal Prosecutions Section, 16th Floor, Strawberry Square, Harrisburg, PA 17120

JS55016/98

Commonwealth of Pennsylvania,	:	In the Court of Common Dauphin County, Pennsylvania
v.	:	No. 1544 CD 1996
Lorenzo Johnson	:	

Commonwealth of Pennsylvania,	:	In the Court of Common Dauphin County, Pennsylvania
v.	:	No. 1544 CD 1996
Corey Walker	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Dauphin County be, and the same is hereby Affirmed.

BY THE COURT:

/s David Sweczak
Prothonotary

Dated: **September 28, 1998**

Appendix H

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA Respondent	:	No. 928 M.D. Allocatur Docket 1998
v.	:	Petition for Allowance of appeal from the
LORENZO JOHNSON, Petitioner	:	Superior Court

ORDER

PER CURIAM:

AND NOW, this 25th day of February 1999

the petition for allowance of appeal is denied.

TRUE AND CORRECT COPY

Attest: Feb 26 1999

S/JOAN L. STEHULAK, ESQUIRE
JOAN L. STEHULAK, ESQUIRE
DEPUTY PROTHONOTARY

lh

Appendix I

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LORENZO JOHNSON, Petitioner	:
	: No. 4:04-cv-1564
v.	:
NEAL MECHLING, *et. Al* Respondents	: Judge John E. : Jones III

MEMORANDUM AND ORDER

May *15, 2008*

Before the Court in the motion for reconsideration of petitioner Lorenzo Johnson. (Doc. 73.) Johnson seeks to alter or amend the Court's order which denied a certificate of appealability ("COA") with respect to his habeas claim regarding the sufficiency of the evidence presented at his state-court trial. For the reasons set forth below, the Court will grant the motion and

issue a COA with respect to Johnson's sufficiency of the evidence claim.

I. PROCEDURAL HISTORY

This case came before the Court on Johnson's petition for writ of habeas corpus pursuant to § 2254. Johnson raised three claims in his petition: (1) that the evidence presented at trial was insufficient to support his convictions in violation of due process, (2) that the prosecutor committed a *Brady* violation by failing to reveal a plea agreement between the government and a witness, and (3) that his trial counsel was ineffective for failing to request appropriate jury instructions. On March 31, 2008, the Court issued a memorandum and order denying all three grounds raised in Johnson's petition. (Docs. 71, 72.) The Court also denied a COA as to all three claims. (Doc. 71 at 94-

97.) Johnson seeks reconsideration of the denial of a COA with respect to his sufficiency of the evidence claim.

III. DISCUSSION

A. Standard of Review

Johnson moves to alter or amend the Court's March 31, 2008 judgment pursuant to Federal Rule of Civil Procedure 59(e). The purpose of a such motion "is to correct manifest errors of law or fact or to present newly discovered evidence." ***Max's Seafood Cafe*** v. ***Quinteros***, 176 F.3d 669, 677 (3d Cir. 1999) (quoting *Harsco Corp.* v. *Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986)). "Accordingly, a judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (I) an intervening change in the

controlling law; (2) the availability of new evidence that was not available when the court granted the motion ... ; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Id.* (citing *North River Ins. Co.* v. *CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995)). "Reconsideration of judgment is an extraordinary remedy; therefore, such motions are to be granted sparingly." *D'Angio* v. *Borough of Nescopeck*, 56 F. Supp. 2d 502, 504 (M.D. Pa. 1999). "A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of or as an attempt to relitigate a point of disagreement between the Court and the litigant." *Ogden* v. *Keystone Residence*, 226 F. Supp.2d 588, 606 (M.D. Pa. 2002).

B. A Certificate of Appealability Will Issue with Respect to Petitioner's Sufficiency of the Evidence Claim

Johnson asserts that a COA should be granted as to his sufficiency of the evidence claim because, on direct appeal in state court, one judge of the three judge Superior Court panel dissented from that portion of the court's opinion upholding his conviction. Johnson argues that the dissenting judge's finding that there was insufficient evidence to convict him demonstrates that reasonable jurists could debate the merits of his sufficiency of the evidence claim. The Court agrees and will issue a COA as to this claim.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court addresses the merits of a

petitioner's claim, as is the case with Johnson's sufficiency of the evidence claim, to obtain a COA, "a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell, 537* U.S. 322, 336 (2003) (quoting *Slack v. McDaniel,* 529 U.S. 473, 484 (2000)). To obtain a COA a petitioner must prove "something more than the absence of frivolity or the existence of mere good faith on his or her part," but need not convince the court that his appeal will succeed. *Id* at 337-38 (citing *Barefoot v. Estelle,* 463 U.S. 880, 893 (1983». "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and

the case has received full consideration, that petitioner will not prevail." *Id* at 338. The inquiry here is straightforward: Johnson "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at 484).

On direct appeal of his conviction to the Pennsylvania Superior Court, Johnson challenged the sufficiency of the evidence supporting his conviction. Two judges of the three-judge Superior Court panel voted to affirm Johnson's conviction as supported by sufficient evidence. One judge, Judge Schiller, dissented. His dissenting opinion reads, in its entirety:

> I concur with that portion of the Majority's decision which affirms the conviction of Corey Walker for first degree murder of Taraja Williams. I

> dissent from that portion of the Majority's decision which upholds the conviction of Lorenzo Johnson for first degree murder and criminal conspiracy as well as the conviction of Corey Walker for criminal conspiracy. I believe that there is no direct evidence, nor can any be inferred, linking defendant Johnson to the death of Taraja Williams nor any agreement with defendant Walker which resulted in Williams' death.

Johnson argues that Judge Schiller's dissent demonstrates that reasonable jurists would find the Court's rejection of his sufficiency of the evidence claim debatable or wrong.

Although Judge Schiller's opinion does not set forth a lengthy analysis in support of his dissent, the fact that a state-court judge reviewing the same facts under the same standard of review came to the opposite conclusion reached by the federal habeas court demonstrates that reasonable

jurists would debate the merits of the petitioner's claim. Numerous other federal courts have reached the same conclusion. *See, e.g., Bradway* v. *Tilton,* C.A. No. 07-cv-0022, 2008 WL 447509, at *4 (S.D. Cal. Feb. 15,2008); *Belcher* v. *Motley,* C.A. No. 05-CV-483, 2006 WL 2700709, at *15 (E.D. Ky. Sept. 13,2006); *Woods* v. *Chandler,* C.A. No. 05-196, 2006 WL 861287, at *6 (W.D. Ky. Mar. 29, 2006); *Johnson* v. *Fischer, 05-2870,* 2006 WL 176999, at *5 (S.D.N.Y. Jan. 23, 2006); *Farley* v. *Lafler,* C.A. No. 04-CV-72222, 2005 WL 3088347, at *2 (E.D. Mich. Nov. 17,2005); *Sanborn* v. *Parker,* C.A. No. , 2005 WL 5190487, at *80 (W.O. Ky. Jan. 12, 2005); *Robinson v. Stegall,* 157 F. Supp. 2d 802, 820 n.7 (B.D. Mich. 2001); *Story v. Kindt,* 970 F. Supp. 435, 465 (W.O. Pa. 1997). *But see Stanley v. Schriro,*

C.A. No. 98-430, 2006 WL 3360486, at *2 (D. Ariz. Nov. 16,2006).

The Respondents contend that Johnson has not met the stringent standards for a motion under Rule 59(e). While the Court agrees that motions for reconsideration are to be sparingly granted, *D'Angio,* 56 F. Supp. 2d at 504, Johnson's motion presents some of the rare circumstances in which such a motion is appropriately granted. The Court denied a COA in its March 31, 2008 memorandum and order without giving Johnson the opportunity to request such relief or address the issue.[1] Johnson

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[1] Contrary to Johnson's assertion, the Local Rules of this Court and the Local Appellate Rules of the Third Circuit require a district court to rule on a certificate of appealability at the time a decision is rendered on the merits of a habeas claim. *See* 3d Cir. Local App. R. 111 3(b) ("The district court shall state whether a certificate of appealability is granted or denied at the time a final decision is entered on the merits of a claim seeking relief

is therefore not being granted a "second bite at the apple" or allowed to relitigate his claim. Although Johnson referred to Judge Schiller's dissenting opinion in arguing the merits of his sufficiency of the evidence claim, the focus of the COA question is not on the merits of the claim but whether reasonable jurists would find the merits debatable. As the overwhelming weight of the precedent cited above demonstrates, the dissenting state-court opinion requires the issuance of a COA in this case, and the Court erred in overlooking Judge Schiller's opinion in reaching the opposite conclusion. Johnson's motion pursuant to Rule 59(e) is an appropriate vehicle to correct this factual and legal

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under 28 U.S.C. § 2254 or 2255."); M.D. Pa. Local R. 83.32.2(L) ("In accordance with Third Circuit L.A.R. Misc. 111.3(b), at the time a final decision is entered, the court shall state whether a certificate of appealability is granted or denied. ").

error and prevent the manifest injustice of denying a COA which should be issued.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Petitioner's Motion Pursuant to Fed. R. Civ. P. 59(e) to Alter or Amend the Judgment (Doc. 73) is GRANTED; and

2. The Court's Order of March 31, 2008 (Doc. 72) is AMENDED to the extent that, pursuant to 28 U.S.C. § 2253(c), Petitioner is GRANTED a certificate of appealability as to his claim that his convictions for first degree murder and criminal conspiracy violated due process of law because the prosecutor did not present sufficient evidence.

s/ John E. Jones III
John E. Jones III
United States District Judge

Appendix J

Federal Community Defender Office
For The Eastern District Of Pennsylvania
Capital Habeas Unit
Federal Court Division Defender Association Of
Philadelphia
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Ellen T. Greenlee
Defender

Phone Number (215) 928-0520
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Leigh M. Skipper
Chief Federal Defender

September 4, 2009

Marcia M. Waldron, Clerk
United States Court of Appeals
for the Third Circuit
United States Courthouse
601 Market Street
Philadelphia, PA

Re: Johnson v. Mechling, 08-2477
Supplemental Authority Pursuant to
Fed.R.App.P. 28j

Dear Ms. Waldon:

Pursuant to Fed.R.App.P. 28j Appellant Lorenzo Johnson submits as supplemental authority Robertson v. Klem, 2009 WL 2634609 (3d Cir. Aug, 28, 2009) (copy attached).

In Robertson, after finding that the evidence was insufficient as a matter of state law to sustain one of two conspiracy convictions, the Panel held that the state court's "contrary conclusion was an unreasonable application of clearly established federal law as established by the Supreme Court." Id., at *7. This holding supports Appellant's argument that "upholding a conviction in the face of insufficient evidence, is always 'objectively unreasonable.' See Kamienski v. Hendricks, 2009 WL 1477235 (3d Cir. May 28, 2009) at *11." *Reply Brief for Appellant Lorenzo Johnson* at 2.

Respectfully Submitted,
/s/ Michael Wiseman
Michael Wiseman
Amy Donella
Federal Community Defender for the
Eastern District of Pennsylvania
Suite 545 – West, The Curtis Center
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215-928-0520
Counsel for Appellant
Lorenzo Johnson

cc: William Stoycos, Esq.
Assistant Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

Appendix K

September 28, 2009

Criminal Law Division
Appeals and Legal Services Section
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-6348

VIA OVERNIGHT MAIL
Marcia M. Waldron, Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: Lorenzo Johnson v. Neal Mechling et al

Docket No. 08-2477

Dear Ms. Waldron:

Please accept this letter of citation to supplemental authorities submitted to this Court pursuant to Fed.R.A.P. 28(j). This matter is currently scheduled for oral argument in Philadelphia on September 30, 2009.

There are two cases currently pending before the Supreme Court that are pertinent to the above-captioned appeal. In *McDaniel v. Brown*, No. 08-559, the Court will decide the proper standard of review to be employed by federal habeas corpus courts when reviewing sufficiency of the evidence claims under AEDPA. In *Wood v. Allen*, No. 08-9156, the Court will discuss the interplay between 28 U.S.C. § 2254(d)(2) and (e)(1) relating to the deference to be afforded to state court factual findings under the AEDPA. Appellees support our sister states in these cases, and respectfully suggest that it may be prudent to defer a ruling in the present case until the Court issues rulings in these cases.

In his reply brief, appellant relies upon *Kamienski v. Hendricks*, 2009 WL 1477235 (3d. Cir. 2009) (McKee, J.), for the proposition that in order for a state court to constitutionally rely upon an inference to establish an element of an offense beyond a reasonable doubt, the inference in question "must be 'more likely than not to flow' from the facts already established." *Id.* at *11. Appellees respectfully submit that -- for purposes of state sufficiency of the evidence reviews in a habeas context -- this rule has not risen to the level of "clearly established Federal law, as determined by the Supreme Court of the United States . . . ." 28 U.S.C. § 2254(d)(1). Indeed, *Leary v. United States*, 395 U.S. 6, 36 (1969), upon which the panel in *Kamienski* relied, involved the constitutionality of criminal statutory presumptions, not sufficiency of the evidence. Neither *Jackson* nor its progeny have adopted this rule in a habeas context, and

therefore it cannot be used to invalidate a state court conviction under AEDPA.

Similarly, the panel in *Kamienski* applied the following rule in determining the insufficiency of the evidence:

> "[I]f the evidence tends to give equal or nearly equal circumstantial support to guilt and to innocence ... reversal is required: When the evidence is essentially in balance, a reasonable jury must necessarily entertain a reasonable doubt."

Kamienski, 2009 WL at 10 (citing *United States v. Ortega Reyna*, 148 F.3d 540, 543 (5th Cir.1998); *United States v. Wexler*, 838 F.2d 88, 92 (3d Cir.1988)). Again, this rule has not risen to the level of "clearly established Federal law, as determined by the Supreme Court of the United States . . . ." 28 U.S.C. § 2254(d)(1). Neither *Jackson* nor its progeny have adopted this rule in a habeas context, and therefore it cannot be used to invalidate a state court conviction under AEDPA.

Respectfully submitted,

WILLIAM R. STOYCOS
Senior Deputy Attorney General

c: Michael Wiseman , Esquire

Appendix L

October 2. 2009

Criminal Law Division
Appeals and Legal Services Section
16th Floor. Strawberry Square
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(717) 787-6348

VIA OVERNIGHT MAIL

Marcia M. Waldron. Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia. PA 19106

Re: Lorenzo Johnson v. Neal Mechling et al
Docket No. 08-2477

Dear Ms. Waldron:

In accordance with the Court's instructions given during argument held on September 30, 2009, I respectfully submit this letter pursuant to Fed.R.A.P. 28(j) in order to identify for the Court the specific portion of the opinion of *Schlup v. Dela,* 513 U.S. 298 (1995) that I referenced during my presentation.

> At 513 U.S. at 329-330. the Supreme Court of the United States states that:

We note finally that the *Carrier* standard requires a petitioner to show that it is more likely than not that "'no reasonable juror'" would have convicted him. The word "reasonable'" in that formulation is not without meaning. It must be presumed that a reasonable juror would consider fairly all of the evidence presented. It must also be presumed that such a juror would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt.

Though the *Carrier* standard requires a substantial showing, it is by no means equivalent to the standard of *Jackson v. Virginia*. 443 U.S. 307. 99 S.Ct 2781. 61 L.Ed.2d 560 (1979), standard that governs review of claims of insufficient evidence. The *Jackson* standard which focuses on whether any rational juror could have convicted, looks to whether there is sufficient evidence which, if credited, could support the conviction. The *Jackson* standard thus differs in at least two important

ways from the *Carrier* standard. First, under *Jackson* the assessment of the credibility of witnesses is generally beyond the scope of review. In contrast, under the gateway standard we describe today. the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case. the habeas court may have to make some credibility assessments. Second. and more fundamentally. the focus of the inquiry is different under *Jackson* than under *Carrier*. Under *Jackson*. the use of the word "could" focuses the inquiry on the power of the trier of fact to reach its conclusion. Under *Carrier*. the use of the word "would" focuses the inquiry on the likely behavior of the trier offact.

Indeed our adoption of the phrase "'more likely than not"' reflects this distinction. Under *Jackson* the question whether the trier of fact has power to make a finding of guilt requires a binary response: Either the trier of fact has power as a matter of law or it does not. Under *Carrier* in contrast, the habeas court must

> consider what reasonable triers of fact are likely to do. Under this probabilistic inquiry it makes sense to have a probabilistic standard such as "more likely than not." Thus. though under *Jackson* the mere existence of sufficient evidence to convict would be determinative of petitioner's claim. that is not true under *Carrier.*

Schlup v. *Delo.* 513 U.S. at 329-330 (1995) (footnotes omitted).

Respectfully submitted.

/s/ William R. Stoycos
WILLIAM R. STOYCOS
Senior Deputy Attorney General

cc: Michael Wiseman, Esquire

Appendix M

FEDERAL COMMUNITY DEFENDER OFFICE
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Capital Habeas Unit

FEDERAL COURT DIVISION DEFENDER
ASSOCIATION OF PHILADELPHIA

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LEIGH M. SKIPPER DEFENDER
FAX NUMBER (215) 928-0826
CHIEF FEDERAL DEFENDER

October 5, 2009

Marcia M. Waldron, Clerk
United States Court of Appeals
for the Third Circuit United States Courthouse
601 Market Street Philadelphia, PA

Re: Johnson v. Mechling,

08-2477 Response to Appellee's 28j Submissions

Dear Ms. Waldon:

Please accept this letter as Appellant's *Response* to the 28j letters filed by

Appellees on September 29 and October 2, 2009.[1]

October 2, 2009 Letter[2]

Relying on language from Schlup v. Delo, 513 U.S. 298 (1995), which it has taken stunningly out of context, the Commonwealth insists that this Court may not apply the Pennsylvania standard for determining what constitutes a permissible

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[1] Appellant, Lorenzo Johnson, was the Petitioner below and is referred to as Petitioner. Appellees were Respondents below and are referred to as "the Commonwealth." All emphasis is supplied.

[2] The Commonwealth relied in oral argument on Schlup v. Delo, 513 U.S. 298 (1995), not previously cited in its brief, and for which it did not provide Petitioner or the Panel prior notice. The Panel ordered the Commonwealth to submit a 28j letter regarding this citation. This letter responds to that 28j letter and, for economy, to the Commonwealth's earlier 28j submission. This letter is 844 words, exceeding the 28j word limit. Petitioner requests that he be permitted to exceed the word limit under these circumstances and that this *Response* be submitted to the Panel.

inference from an established fact – i.e. that the inference must "more likely than not" flow from the proven fact. Schlup says no such thing.

In order to permit consideration of a claim of innocence in an otherwise successive habeas petition, Schlup incorporated the Murray v. Carrier standard, which permitted consideration of a defaulted claim if the constitutional violation **probably** resulted in the conviction of someone who is actually innocent. Schlup, 513 U.S. at 327. Schlup then determined that to establish that the violation "probably" resulted in conviction, "the petitioner must **show that it is more likely than not** that no reasonable juror would have convicted him in the light of the new evidence." Id. The Court counterposed this standard against the deference to

be accorded a jury determination under Jackson's sufficiency-of-the-evidence analysis.

Thus viewed, Schlup's comparison of Carrier's "more likely than not" standard with Jackson's standard, is nothing more than a recognition that a petitioner asserting a gateway entitlement to review of either a defaulted (Carrier) or abusive (Schulp) claimmust meet an evidentiary burden, whereas a petitioner asserting a Jackson claim must accept the prosecution's facts as true. Schlup, 513 U.S. at 330 ("under Jackson the mere existence of evidence to convict is determinative of petitioner's claim [which] is not true under Carrier." This comparison does not even remotely stand for the proposition advanced by the Commonwealth: that Jackson precludes application

of Pennsylvania's more likely than not standard in assessing sufficiency in this case.

September 29, 2009 Letter

This Court should reject the Commonwealth's request to defer ruling on Petitioner's appeal pending the Supreme Court's rulings in McDaniel v. Brown and Wood v. Allen. Neither case is relevant to the issues presented by this appeal.

In McDaniel, the Ninth Circuit misapplied Jackson by disregarding the prosecution's trial DNA evidence and substituting DNA evidence first presented in habeas proceedings, when reviewing the state's evidence for sufficiency purposes. Therefore, the prosecution in McDaniel does not

seek clarification of the Jackson standard under AEDPA – it seeks enforcement of the requirement that the reviewing court credit all of the state's evidence.[3]

Wood considers the interplay between AEDPA's 2254(d)(2) and (e)(1) in the context of counsel ineffectiveness and related mental retardation claims. Petitioner here should prevail on his appeal even if the Court assumes the correctness of all state court fact-findings.

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[3] See amicus brief of the United States of America, Question Presented, 2009 WL 13003392 ("Whether a court, in evaluating the sufficiency of the evidence under Jackson [], may disregard evidence presented to the jury if the court concludes that additional evidence submitted after trial demonstrates that the trial evidence was inaccurate or unreliable.").

The Commonwealth's argument – that, because Pennsylvania's "more likely than not" rule governing inferences has "not risen to the level of 'clearly established Federal law," Petitioner is not eligible for relief under 28 U.S.C. § 2254(d)(1) – is far off the mark. Under this argument, relief would only be available for a Jackson violation if the United States Supreme Court had decided a sufficiency case involving the precise state law governing the claim. This is not required by 28 U.S.C. § 2254(d)(1), which does not require a United States Supreme Court case addressing every legal permutation that may impact a habeas claim. See Williams v. Taylor, 529 U.S. 362, 382 (2000) ("That the Strickland [v. Washington, 466 U.S. 668] test 'of necessity requires a case-by-case

examination of the evidence' obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' [for 2254(d)(1) purposes] by this Court.")

Finally, the Commonwealth takes issue with Petitioner's statement that when a state court sustains a conviction in the face of insufficient evidence it is "always" an unreasonable application of Jackson. As noted at oral argument, Petitioner's position is that a state court which sustains a conviction that is based only on speculation, conjecture and surmise, unreasonably applies Jackson.

Respectfully Submitted,
/s/ Michael Wiseman
Michael Wiseman
Amy Donnella

For Appellant, Lorenzo Johnson

C: William R. Stoycos, Sr. Deputy Attorney General

Appendix N

October 6, 2009

Criminal Law Division
Appeals and Legal Services Section
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-6348

VIA OVERNIGHT MAIL
Marcia M. Waldron, Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: Lorenzo Johnson v. Neal Mechling et al

Docket No. 08-2477

Dear Ms. Waldron:

Please accept this Rule 28(j) letter as Appellees' ("the Commonwealth") response to the Rule 28(j) letter filed by Appellant ("Johnson") on October 5, 2009.[1]

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[1] This letter contains 605 words. In light of the specific allegations and issues raised in Johnson's most recent Rule 28(j) letter as well as the fact that

Regrettably, Johnson's written submission misrepresents the position taken by the Commonwealth at oral argument on September 30, 2009. The Commonwealth did **not** argue that the decision of the Supreme Court in *Schlup v. Delo*, 513 U.S. 298 (1995) stands for the proposition that "this Court may not apply the Pennsylvania standard for determining what constitutes a permissible inference from an established fact" (10/5/09 Rule 28(j) letter of Appellant at 2). Instead, the Commonwealth argued that in *Schlup*, the Supreme Court elaborated on the standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979) by comparing that standard with the one to be applied in cases involving a claim of actual innocence and indicated that the *Jackson* standard: (1) requires a federal habeas court to ask whether, viewing the evidence in the light most favorable to the prosecution, a rational juror had the power to convict as a matter of law; and (2) does not involve a probabilistic more-likely-than-not test. The Commonwealth also argued – separate and distinct from the decision in *Schlup* – that the question of whether the state courts properly applied state law is beyond the scope of this Court's review under the scheme established by AEDPA. Johnson's most recent submission to the Court incorrectly conflates these two distinct arguments.

Johnson requested and apparently received permission to exceed the word limitation imposed by the Rule, the Commonwealth similarly requests permission of the Court to exceed the word limitation and for this response to be submitted to the Panel.

In his brief, Johnson makes the explicit argument that the Commonwealth is not entitled to have an inference drawn in its favor in the context of a *Jackson* review unless the inference "is more likely than not to lead to guilt" (Br. of Appellant at 7).[2] Not only is this assertion not clearly established federal law as determined by the Supreme Court of the United States, but it is in conflict with the Supreme Court's decisional law in *Jackson*, as elaborated upon in *Schlup*, that in the context of a sufficiency of the evidence review: (1) the trier of fact may draw an inference from a combination of facts;[3] (2) a federal habeas court

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[2] The precise language used by Johnson is:

> The Commonwealth has pointed to many inferences that "could" be drawn. However, **none of them** is more likely than not to lead to guilt whether viewed singularly or in toto...

(Br. of Appellant at 7) (emphasis in original). With this assertion, Johnson has – without explanation – transmogrified a purported state evidentiary rule that an inference is reasonable if it is "more likely than not to flow from the proved fact" into a federal habeas rule governing review under *Jackson* that an inference may not be credited unless it "is more likely than not to lead to guilt." Johnson's most recent Rule 28(j) letter is conspicuously silent on this point.

[3] *Jackson*, 443 U.S. at 325 ("The prosecution's uncontradicted evidence established [six distinct

must view the evidence in the light most favorable to the prosecution and when faced with facts that give rise to conflicting inferences, must presume that the trier of fact resolved such conflicts in favor of the prosecution and must defer to that resolution;[4] (3) a federal habeas court must focus on whether the trier of fact **could** have reached its conclusion based on the evidence presented, not whether it **reasonably should** have done so;[5] and (4) a federal habeas court does not apply a probabilistic more-likely-than-not test.[6]

Respectfully submitted,
/s/ William R. Stoycos
WILLIAM R. STOYCOS
Senior Deputy Attorney General

cc: Michael Wiseman, Esquire

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facts]...From these uncontradicted circumstances, a rational factfinder readily could have inferred beyond a reasonable doubt that the petitioner...had in fact formed an intent to kill the victim").

[4] *Jackson*, 443 U.S. at 326.

[5] *Schlup*, 513 U.S. at 330.

[6] *Schlup*, 513 U.S. at 330.

Appendix O

Federal Community Defender Office
For The Eastern District Of Pennsylvania
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Ellen T. Greenlee **Phone Number (215) 928-0520**
Defender **Fax Number (215) 928-0826**
Fax Number (215) 861-3508

Leigh M. Skipper
Chief Federal Defender

January 12, 2010

Marcia M. Waldron, Clerk
United States Court of Appeals for the Third Circuit United States Courthouse
601 Market Street
Philadelphia, PA

Re: Johnson v. Mechling, 08-2477
Submission of Supplemental Authority Pursuant to Rule 28j

Dear Ms. Waldon:

Please accept this letter providing Supplemental Authority pursuant to Rule 28j.[1]

---

[1] Appellant, Lorenzo Johnson, is referred to as

The Attorney General submitted a prior 28j letter (dated September 29, 2009) suggesting that the Court delay a decision of this appeal pending the United States Supreme Court decision in Brown v. McDaniel, 08-559. That case was decided yesterday. A copy is attached.

As Petitioner predicted in his response to the Attorney General's 28j letter addressing Brown (dated October 5, 2009), and in response to the Panel's questions during oral argument, the Brown decision has not changed the analysis of a Jackson v. Virginia, 443 U.S. 307 (1979) claim, even hrough the AEDPA prism. As Petitioner pointed out, the Jackson claim in Brown was unusual, because – contrary to the clear dictates of Jackson – the federal courts failed to credit the trial evidence in a light most favorable to the prosecution and,

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Petitioner.

moreover, relied upon extra-record evidence presented for the first time in federal habeas proceedings. Thus, the Supreme Court stated that the petitioner in Brown "did not bring a typical Jackson claim." Brown, at 6 (page references are to the attached slip opinion); id., at 10 ("Although we granted certiorari to review respondent's Jackson claim, the parties now agree that the Court of Appeals' resolution of his claim under Jackson was in error"); id., at 11 ("there has been no suggestion that the evidence adduced at trial was insufficient to convict unless some of it was excluded").

While the Court discussed AEDPA analysis of a Jackson claim, it said nothing new. Brown reiterates, by quoting Jackson, that a reviewing court must credit conflicting inferences in the trial prosecutor's favor. Brown, at 13. The Court also noted, wholly consistent with Petitioner's Jackson

argument, that "a *reasonable* jury could hardly be convinced of guilt unless it found each element satisfied beyond a reasonable doubt." Brown, at 12 n. 4 (emphasis in original). Thus, a state court unreasonably applies Jackson, not because it fails to distinguish between a reasonable jury and a rational jury, but when it fails properly to consider whether the evidence is sufficient to find all elements of a crime beyond a reasonable doubt, id., the very claim Petitioner has presented to this Court.

Finally, Brown does not touch upon the evidentiary questions raised in Petitioner's case, i.e., whether the jury in Petitioner's case drew inferences that were violative of state evidentiary law and that, therefore, the convictions were insufficient and violated due process of law.

Respectfully Submitted,

/s/ Michael Wiseman
Michael Wiseman
Amy Donnella
For Appellant, Lorenzo Johnson

cc: William R. Stoycos
Senior Deputy Attorney General

Appendix P

January 21, 2010

Criminal Law Division
Appeals and Legal Services Section
16th Floor, Strawberry Square
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(717) 787-6348

VIA ELECTRONIC FILING & OVERNIGHT MAIL

Marcia M. Waldron, Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: Lorenzo Johnson v. Neal Mechling et al

Docket No. 08-2477

Dear Ms. Waldron:

Please accept this letter as a citation to supplemental legal authority pursuant to Fed.R.A.P. 28(j) and as a response to Petitioner's Rule 28(j) letter filed on January 12, 2009.[1]

---

[1] This letter contains 802 words. In light of the gravity of this case and the importance of the

As noted by Petitioner in his recent filing, on January 11, 2010, the Supreme Court of the United States issued a *per curiam* opinion in the case of *McDaniel v. Brown*, ---S.Ct. ---, 2010 WL 58361 (January 11, 2010). Contrary to the assertion of Petitioner, the *McDaniel* opinion is both relevant and material to this Court's disposition of Petitioner's appeal for the following reasons:

1. It reaffirms the Supreme Court's previous statements that the guiding principle for sufficiency-of-the-evidence reviews pursuant to *Jackson v. Virginia*, 443 U.S. 307 (1979) is that a reviewing court must ask whether the evidence of record viewed in its totality and viewed in the light most favorable to the prosecution provided a rational juror with the power (i.e. legal ability) to find guilt beyond a reasonable doubt. In doing so, the opinion cites *Schlup v. Delo*, 513 U.S. 298 (1995) – specifically cited by Respondents at argument and in their Rule 28(j) letter dated October 2, 2009 --for the rule that the *Jackson* standard looks to whether there is sufficient evidence which, **if credited by the factfinder,** could support the conviction. Given this authority, Petitioner's argument that the state courts **should not have credited** available inferences that could have supported the prosecution's case must be

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Supreme Court's decision in *McDaniel* to disposition of the instant appeal, Respondents respectfully request permission of the Court to exceed the word limitation and for this response to be submitted to the Panel.

rejected.

2. It states that a reviewing court conducting a *Jackson* analysis "faced with a record of historical facts that supports conflicting inferences **must** presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *McDaniel*, 2010 WL 58361, *13 (emphasis added). The opinion provides an illustration of this point:

> It is undisputed that Troy washed his clothes immediately upon returning home. The court [of appeals] notes this is "plausibly consistent with him being the assailant" but also that he provided an alternative reason for washing his clothes. *Ibid.* **Viewed in the light most favorable to the prosecution, the evidence supports an inference that Troy washed the clothes immediately to clean blood from them.**

Id. at *14 (emphasis added). This is highly significant because Petitioner in the instant case is asking this Court to reject inferences that this Court must presume were drawn by his jury in favor of the prosecution on the grounds that they were unreasonable due to the existence of conflicting inferences. The opinion supports Respondents' argument in their brief that "if a reasonable inference favorable to the Commonwealth can be drawn, it shall be drawn for purposes of "evidentiary sufficiency" review" (Brief for Appellee at 31 n.10).

3. In addressing the role of inferences in a

Jackson analysis under AEDPA, the opinion does not identify or acknowledge a duty on the part of the federal habeas court to evaluate the state courts' application of **state** evidentiary law. Instead, the opinion reaffirms the well-established rule that under AEDPA, a federal habeas court reviews the objective reasonableness of a state court's application of clearly established **federal** law. *Id.* at * 13, * 15, *16 n. 7. This is entirely consistent with the Supreme Court's prior holdings that federal habeas law does not exist to retry state law issues and that a federal court may not issue the writ on the basis of a perceived error of state law.

4. It determines that because the state prisoner, faced with a non-meritorious *Jackson* claim, recast his argument under a different theory of due process that was not raised before the state or lower federal courts, he forfeited his non-*Jackson* claim. This directly applies to the instant appeal because Petitioner states for the first time in his January 12, 2010 Rule 28(j) letter that the question he has presented to this Court on appeal is "whether the jury in Petitioner's case drew inferences that were violative of state evidentiary law" which in turn rendered his conviction a violation of the Due Process Clause (1/12/10 Letter of Petitioner at 3). The simple fact is that Petitioner never presented this purported violation of his federal constitutional rights to the state courts or federal district court as a free-standing basis for relief. Until this appeal, Petitioner has always articulated his claim solely in terms of insufficient evidence to convict.

Respectfully submitted,

/s William R. Stoycos
WILLIAM R. STOYCOS
Senior Deputy Attorney General

cc: Michael Wiseman, Esquire

Appendix R

FEDERAL COMMUNITY DEFENDER OFFICE
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Capital Habeas Unit

FEDERAL COURT DIVISION
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Leigh M. Skipper — Fax Number: (215) 861-3508
Chief Federal Defender

January 21, 2010

Marcia M. Waldron, Clerk
United States Court of Appeals
for the Third Circuit
United States Courthouse
601 Market Street
Philadelphia, PA

Re: Johnson v. Mechling, 08-2477
Response to Supplemental Authority
Pursuant to Rule 28j

Dear Ms. Waldon:

Please accept this letter responding to the Commonwealth's oversized 28j letter filed today.[1]

---

[1] The Commonwealth's letter is 805

The Commonwealth's first, second and third points continue to miss the mark. Petitioner has always acknowledged that a habeas court must view multiple inferences in a light most favorable to the prosecution. However, that is only true if the inferences are proper under state law. Petitioner has amply demonstrated in his prior submissions that Pennsylvania law does not permit a conviction to survive that is based upon the multiple inferences – each of which is equally consistent with innocence – required to sustain the conviction in this case, particularly with respect to specific intent to kill.

The Commonwealth's fourth point requires no response.

Respectfully Submitted, /
s/ Michael Wiseman
Michael Wiseman
Amy Donnella
For Appellant, Lorenzo Johnson

cc: William R. Stoycos
Senior Deputy Attorney General

---

words, more than twice the 350 words permitted by the Rule. Petitioner requests that either the Court strike the over sized letter or permit this brief (149 word) reply.

Appendix S

November 9, 2010

Criminal Law Division
Appeals and Legal Services Section
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-6348

VIA OVERNIGHT MAIL
Marcia M. Waldron, Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: Lorenzo Johnson v. Neal Mechling et al

Docket No. 08-2477

Dear Ms. Waldron:

Please accept this letter as a citation to supplemental legal authority pursuant to Fed.R.A.P. 28(j).

On November 8, 2010, the Supreme Court of the United States issued a *per curiam* opinion in

the case of *Wilson v. Corcoran*, 562 U.S. __, 2010 WL 4394137 (Nov. 8, 2010). The opinion is pertinent and significant to the instant appeal because it reaffirms the Supreme Court's previous statements that it is not the province of the federal court to reexamine state-court determinations on state-law questions:

> ...The [Court of Appeals] panel therefore required the Indiana trial court to reconsider its sentencing determination in order to "prevent non-compliance with Indiana law." 593 F.3d, at 552-553.
>
> **But it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts.** The habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.

> §2254(a). And we have repeatedly held that "'federal habeas corpus relief does not lie for errors of state law.'" *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). **"[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."** 502 U.S., at 67-68.

Wilson, 2010 WL 4394137 at *2 (bolded language added).

This language is significant because Appellant Lorenzo Johnson's "sufficiency of the evidence" due process argument relies on the assertion that the state courts misapplied state law governing evidentiary inferences and that if those inferences had been drawn "properly," the evidence would have been insufficient to support the verdict of guilt. Such an analysis and finding by this Court – which of necessity would involve a reexamination of the Pennsylvania courts' application of Pennsylvania evidentiary law -- is foreclosed by the *Wilson* opinion.

A copy of the opinion is attached hereto.

Respectfully submitted,

WILLIAM R. STOYCOS
Senior Deputy Attorney General

cc: Michael Wiseman, Esquire

Appendix T

FEDERAL COMMUNITY DEFENDER OFFICE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Capital Habeas Unit

FEDERAL COURT DIVISION DEFENDER ASSOCIATION OF PHILADELPHIA

SUITE 545 WEST -- THE CURTIS CENTER 601 WALNUT STREET PHILADELPHIA, PA 19106

ELLEN T. GREENLEE PHONE NUMBER (215) 928-0520
LEIGH M. SKIPPER
DEFENDER FAX NUMBER (215) 928-0826 CHIEF FEDERAL DEFENDER FAX NUMBER (215) 861-3508

November 15, 2010

Marcia M. Waldron, Clerk United States Court of Appeals for the Third Circuit 21400 United States Courthouse 601 Market Street Philadelphia, Pennsylvania 19106

Re: Lorenzo Johnson v. Neal Mechling et al, Docket No. 08-2477

lt

Dear Ms. Waldron:

Please accept this letter in response to Appellee's *Citation to Supplemental Legal Authority Pursuant to Fed.R.A.P. 28(j)*, directing this Court to Wilson v. Corcoran, 562 U.S. __, 2010 WL 4394137 (Nov. 8, 2010). Wilson has nothing to do with the issues before this Court on this appeal.

The Commonwealth's latest submission again demonstrates its fundamental misunderstanding of the role played by a federal habeas court in reviewing a constitutional claim of insufficient evidence. As Petitioner has tried to make clear during the course of this appeal, he was convicted without sufficient evidence to prove that he had the requisite intent to kill. As this Court and the United States Supreme Court have long recognized, a conviction based on evidence that is insufficient to prove each element of an offense beyond a reasonable doubt violates due process of law. See e.g. Jackson v. Virginia, 443 U.S. 307 (1979). When a state court rejects a sufficiency claim based upon application of state law of evidence, that application can implicate the same due process concerns set forth in Jackson. See e.g. Jackson v. Byrd, 105 F.3d 145 (3d Cir. 1997) ("Although Jackson v. Virginia sets

forth a federal test for sufficiency of the evidence which is applicable in habeas corpus proceedings, federal courts in habeas corpus proceedings nevertheless look to the evidence the state considers adequate to meet the elements of a crime governed by state law.").

In its supplemental submissions to this Court, including this most recent one, the Commonwealth continues to make the same error it made when it argued to this Court over one year ago, on September 30, 2009.

In Wilson, the Seventh Circuit granted habeas sentencing relief based on its determination of Wilson's claim that, under Indiana state law, the Indiana trial court had improperly balanced aggravating and mitigating factors in determining sentence. The United States Supreme Court vacated the grant of relief and remanded because the decision by the Court of Appeals instructed the Indiana trial court "to reconsider its sentencing determination *in order to 'prevent noncompliance with Indiana law.*' 593 F. 3d at 552-553." 2010 WL 4394137 (Emphasis supplied.) Thus, the operative language in Wilson to which Appellee points this Court - "[I]t is not the province of a federal habeas court to reexamine state-court determinations on

state-law questions" (Appellee's letter at 2) - is irrelevant to this Court's determination of Petitioner's federal sufficiency claim.

Petitioner has explained that even applying Pennsylvania's own evidentiary standards, the Commonwealth has failed to demonstrate the required intent to kill. Thus, Petitioner is entitled to relief because his conviction was based on an unreasonable determination of the facts presented in state court (28 U.S.C. §2254(d)(2)) and because the decision in his case was contrary to clearly established federal law, as determined by the Supreme Court of the United States. (28 U.S.C. §2254(d)(1).)

Respectfully submitted,

/s/ Michael Wiseman

MICHAEL WISEMAN AMY DONNELLA For Appellant/Petitioner, Lorenzo Johnson

C: William R. Stoycos,
Sr. Deputy Attorney General

Appendix U

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2477

LORENZO JOHNSON,
Appellant

v.

NEAL MECHLING, *ET AL.*,
Appellees

APPELLEES' MOTION FOR LEAVE TO FILE SUPPLEMENT TO PENDING PETITION FOR REHEARING *EN BANC* DUE TO RECENT ISSUANCE BY UNITED STATES SUPREME COURT OF OPINION THAT IS DIRECTLY ON POINT

Appellees, Neal Mechling, *et al.* ("the Commonwealth"), through undersigned counsel, hereby respectfully request that this Honorable Court grant them leave to file a brief supplement to their recently-filed petition for rehearing *en banc* limited to the existence and significance of the United States Supreme Court's recent issuance of a

decision that is directly on point in this appeal. In support thereof, Appellees aver the following:

1. On March 17, 1997, Petitioner Lorenzo Johnson ("Johnson") was convicted of first-degree murder and criminal conspiracy by a state trial court, following which he was sentenced to serve a mandatory term of life imprisonment.

2. Johnson's efforts to overturn his judgment of sentence in the state courts failed.

3. On March 31, 2008, the United States District Court for the Middle District of Pennsylvania ("the district court") denied Johnson's petition for a writ of habeas corpus. That court determined that all three claims advanced by Johnson lacked merit.

4. On October 4, 2011, two judges of a three-judge panel of this Honorable Court reversed the district court's denial of habeas corpus relief for Johnson, purportedly resting its determination entirely on a

finding that the state courts had unreasonably applied the law of *Jackson v. Virginia*, 443 U.S. 307 (1979) governing the quantum of evidentiary support necessary for a criminal conviction to pass constitutional muster under the Due Process Clause. The third member of the panel issued a dissenting opinion indicating that the state courts' application of *Jackson* was reasonable and that habeas corpus relief should be denied.

5. On October 21, 2011, the Commonwealth filed a timely petition for rehearing *en banc* in this Court.

6. On October 31, 2011, the United States Supreme Court issued a decision that is **directly on point** for the instant appeal and the Commonwealth's pending petition for rehearing *en banc*. *See Javier Cavazos v. Shirley Ree Smith*, 565 U.S. __ (2011) (*per curiam*). More specifically, the Supreme Court's decision addresses and clarifies the

meaning of *Jackson v. Virginia*, its application by the state courts, and the proper role of the federal courts in evaluating state court application of *Jackson* in the federal habeas corpus context.1

1 Beyond this general description, the Commonwealth is refraining from a more detailed discussion of the Supreme Court's decision, including its significance to the instant appeal and petition for rehearing *en banc*, until it is granted permission to do so by this Court.

7. Although undersigned counsel for the Commonwealth would not normally seek permission to supplement a petition for rehearing, it seems inconceivable that the Court would not want to be advised of a recent ruling by the United States Supreme Court that directly relates to and governs determinations yet to be made by this Court in this case.

8. The Commonwealth believes that the *Cavazos* decision issued by the High Court two days ago has significant implications for the panel majority's October 4, 2011 determination in this case as well as for this Court's future ruling on the petition for rehearing *en banc*, and it seeks permission to articulate those implications for the benefit of the Court.

WHEREFORE, Appellees respectfully request that this Honorable Court grant them leave to file a brief supplement to their recently-filed petition for rehearing *en banc* limited to the existence and significance of the United States Supreme Court's recent issuance of a decision that is directly on point in this appeal.

Respectfully submitted,

LINDA KELLY
Attorney General

RICHARD A. SHEETZ, JR.
Executive Deputy Attorney General
Director, Criminal Law Division

JAMES BARKER
Chief Deputy Attorney General
Appeals & Legal Services Section

/s/ William R. Stoycos
WILLIAM R. STOYCOS
Senior Deputy Attorney General
Attorney ID # 68468
wstoycos@attorneygeneral.gov

OFFICE OF ATTORNEY GENERAL
Criminal Law Division
Appeals and Legal Services Section
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-6348
Date: November 2, 2011

CERTIFICATION OF ELECTRONIC FILING

I, William R. Stoycos, Senior Deputy Attorney General, do hereby certify that the text of the electronic motion is identical to the text in the paper copies. I also certify that the following virus detection program -- SYBARI ANTIGEN Version 8.00.1470 -- was run on the file and no virus was detected

/s/ William R. Stoycos
William R. Stoycos
Senior Deputy Attorney General
Attorney I.D. No. 68468
Counsel for Appellees
OFFICE OF ATTORNEY GENERAL
Criminal Law Division
Appeals and Legal Services Section
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-6348
Date: November 2, 2011

CERTIFICATE OF SERVICE

I, William R. Stoycos, do hereby certify that I have this day served the foregoing petition for rehearing by causing two (2) copies of the same to be deposited in the United States mail, first class postage prepaid, addressed to counsel for appellant as follows:

Michael Wiseman, Esquire
Amy Donnella, Esquire
Defender Association of Philadelphia
Capital Habeas Corpus Unit
The Curtis Center, Suite 545-W
Independence Square West
Philadelphia, PA 19106
(215) 928-0520
(Counsel for Appellant)

/s/ William R. Stoycos
William R. Stoycos
Senior Deputy Attorney General Attorney I.D. No. 68468
Counsel for Appellees
OFFICE OF ATTORNEY GENERAL
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(717) 787-6348 Date: November 2, 2011

Appendix V

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-2477

LORENZO JOHNSON,
Appellant

v.

NEAL MECHLING, et al.

APPELLANT'S RESPONSE IN OPPOSITION TO *"APPELLEES' MOTION FOR LEAVE TO FILE SUPPLEMENT TO PENDING PETITION FOR REHEARING EN BANC DUE TO RECENT ISSUANCE BY UNITED STATES SUPREME COURT OF OPINION THAT IS DIRECTLY ON POINT"*

Appellant, Lorenzo Johnson, through undersigned counsel, hereby opposes Appellees' motion to file a supplement to its pending petition for *en banc* rehearing.

1. On October 4, 2011 a *Panel* of this Court issued its *Opinion* and *Judgment* holding that Lorenzo Johnson's conviction and sentence were unconstitutional, as they were based on insufficient evidence.

2. On October 21, 2011, Appellees filed a *Petition for En Banc Rehearing*.

3. On November 2, 2011, Appellees moved for permission to file a supplement to the rehearing petition in order to bring to the Court's attention, *Cavazos v. Smith*, No. 10–1115 (Oct. 31, 2011), and requesting permission to file a "brief supplement" to the *Petition*.

4. If Appellees' intention is to bring this decision to the attention of the Court, they have done so with their filing.[1] Appellees have gone beyond this in their *Motion*, however, and have also provided the Court with their own erroneous characterization of the alleged importance of this decision, *e.g.*, asserting it is "right on point." *Motion*, at 1.

5. Contrary to Appellees' assertions, *Cavazos* is not "on point" and does not "clarif[y] the meaning of *Jackson v. Virginia*, its application by the state courts, and the proper role of the federal courts in evaluating state court application of *Jackson* in the federal habeas corpus context." *Motion*, ¶ 6. As is evident from the face of the decision, *Cavazos* was an error-correcting rebuke of a particular panel of the Court of Appeals for the Ninth Circuit:

> The decision below cannot be allowed to stand. This Court vacated and remanded this judgment twice before, calling the panel's attention to this Court's opinions highlighting the necessity of deference to state courts in §2254(d)

habeas cases. Each time the panel persisted in its course, reinstating its judgment without seriously confronting the significance of the cases called to its attention. *Cavazos v. Smith, slip op.* at 8 (emphasis added).

---

[1] By its terms, Fed. R. App. P. 28j does not apply in the rehearing stage: "if pertinent and significant authority comes to a party's attention after the party's brief has been filed – or after oral argument but before decision – a party may" file Supplemental Authority.

6. A review of the body of the decision shows why the rebuke was necessary, and why *Cavazos* neither breaks new ground nor adds clarification to the issues in Appellant's case. The Ninth Circuit panel choose to credit the defense's expert testimony over that offered by the prosecution. *See e.g. Cavazos, slip op.* at 7 ("The Ninth Circuit's assertion that these [prosecution's] experts 'reached [their] conclusion because there was no evidence in the brain itself of the cause of death' **is simply false**.") (emphasis added). Discrediting the prosecution's evidence in evaluating a sufficiency claim is a blatant violation of *Jackson v. Virginia*, 443 U.S. 307 (1979), and its progeny, which requires a habeas court to **accept, not reject**, the prosecution's facts as true. *Id., slip op.* At 6.

7. *Cavazos* notably did not change or clarify the *Jackson* standard, or how a habeas court should review sufficiency claims through AEDPA's prism. *See e.g. Id., slip op.* at 1, *citing* the *Jackson* standard and *Renico v. Lett*, 559 U. S ___, ___ (2010) (*slip op.*, at 5) (holding that a habeas court must review the state court application of *Jackson* to determine if it was "objectively unreasonable"). Mr. Johnson's *Panel* followed AEDPA's § 2254d and *Renrico*, by repeatedly analyzing the state court's resolution of his *Jackson* claim in order to determine whether it was "objectively unreasonable." *See Johnson v. Mechling*, 2011 WL 4565464 at * 6, 7 & 9 (3d Cir. Oct. 4, 2011) (citing and applying

AEDPA's "unreasonable application" standard to the state court decisions in this case).

8. And Mr. Johnson's *Panel* followed *Jackson*. It made no credibility findings, as did the *Cavazos* panel. To the contrary, it credited the Commonwealth's proof as true and properly concluded that Mr. Johnson's conviction nonetheless rested on speculation. *Johnson, Id.* at * 8 - * 11 (noting that taking the proof against Mr. Johnson as true, the verdict was based on speculation and not upon proper or reasonable inferences).

9. In sum, there is no reason for this Court to permit the unusual filing of a supplement to a rehearing petition.

WHEREFORE, Appellant respectfully requests that Appellees' Motion be denied.

Respectfully Submitted,

/s/ Michael Wiseman

Michael Wiseman
Signing for All Counsel

Certificate of Service

I, Michael Wiseman, hereby certify that on 3rd day of November 2011 I served the foregoing on the following by filing the same with this Court's ECF filing system:

William Stoycos
Assistant Attorney General

/s/ Michael Wiseman
Michael Wiseman

Appendix W

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

November 3, 2011

No. 08-2477

LORENZO JOHNSON,
Appellant

v.

NEAL MECHLING, Et al.

(M.D. Pa. No. 04-cv-01564)

Present: McKEE, Chief Judge, CHAGARES and NYGAARD, Circuit Judges

1. Motion by Appellees to Supplement the Pending Petition for Rehearing En Banc due to Recent Issuance by United States Supreme Court;

2. Response by Appellant in Opposition to Appellees' Motion to Supplement the Pending Petition for Rehearing;

3. Reply by Appellees to Appellant's Response in Opposition.

Respectfully,

Clerk/lml

1w

ORDER

The foregoing motion by Appellees to supplement their petition for rehearing is hereby DENIED.

By the Court,

/s/ Richard L. Nygaard
Circuit Judge

Dated: November 8, 2011

CJG/cc: Amy G. Donnella, Esq.
Michael Wiseman, Esq.
William R. Stoycos, Esq.

2w

Appendix X

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2477

LORENZO JOHNSON,
Appellant
v.
NEAL MECHLING, SUPERINTENDENT;
COMMONWEALTH OF PENNSYLVANIA
Appeal from the United States District Court for
the Middle District of Pennsylvania
(D.C. Criminal No. 4-04-cv-01564)

District Judge: Honorable John E. Jones, III
Present: McKEE, Chief Judge, SLOVITER,
SCIRICA, RENDELL, AMBRO, FUENTES,
SMITH, FISHER, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, Jr., VANASKIE, and
NYGAARD,* Circuit Judges

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellees in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for rehearing is hereby DENIED.

* The vote of Honorable Richard L. Nygaard, Senior Judge of the United States Court of Appeals for the

Third Circuit, is limited to panel rehearing only. Judge Fisher, Judge Hardiman, and Judge Chagares would have granted the petition.

BY THE COURT:

/s/ Richard L. Nygaard
United States Circuit Judge

Dated: November 8, 2011

CJG/cc: Amy G. Donnella, Esq.
Michael Wiseman, Esq.
William R. Stoycos, Esq.

Appendix Y

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

LORENZO JOHNSON, Petitioner	:	4:04-cv-1564
v.	:	Hon. John E. Jones III
NEAL MECHLING, *et al.*, Respondents.	:	

ORDER

January 17, 2012

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Currently pending before the Court are Petitioner Lorenzo Johnson's ("Petitioner" or "Johnson") Motion for Issuance of Writ or Bail (Doc. 91) and Emergency Motion for Order to Show Cause. (Doc. 92). Both Motions seek the release of Petitioner following the mandate issued by the Court of Appeals for the Third Circuit on November 16, 2011 that instructed this Court to issue a writ of habeas corpus with respect to Petitioner. The parties have fully briefed the Motions and a hearing was conducted on January 12, 2012. The Court has also accepted supplemental letter briefs from the parties. Thus, this matter is fully at issue before the Court.

ly

I. BACKGROUND

On October 4, 2011, the United States Court of Appeals for the Third Circuit issued an opinion reversing this Court's order denying Johnson's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and remanding the matter back to us with an instruction to issue the writ. On November 16, 2011, the Third Circuit issued its mandate. Thereafter, the instant Motions were filed.

As noted above, Johnson seeks to have this Court issue the writ of habeas corpus pursuant to the determination of the Third Circuit. Alternatively, Johnson requests that he be released from prison with conditions pending the disposition of the Commonwealth's appeal to the Supreme Court.[1] The Respondents oppose Johnson's Motions and requests for relief, arguing that we should stay the issuance of the writ until their petition for writ of certiorari is decided by the Supreme Court.

II. DISCUSSION

Substantial discretion is afforded to district courts in determining the propriety or lack thereof of release from prison when a grant of habeas relief is pending on appeal. *Hilton v. Braunskill*, 481 U.S. 770 (1987). There is a presumption of release pending appeal where a petitioner has been granted habeas relief. *O'Brien v. O'Laughlin*, – U.S.

---

[1] Obviously in this circumstance, the issuance of the writ would be stayed pending the outcome in the Supreme Court.

–, 130 S. Ct. 5, 6 (2009). This presumption can only be overcome if the traditional factors regulating the issuance of a stay weigh in favor of granting a stay. *Id.*

As noted above, on January 12, 2012, we conducted a hearing on the Petitioner's Motions. Petitioner presented testimony from four employees of SCI Mahanoy, where Petitioner is presently incarcerated. All of these individuals testified that Petitioner is a model prisoner, who has never demonstrated any attitude, aggression or dishonesty in all of their interactions with him. Petitioner also presented his brother, Tyrone Johnson, who testified that, if released, Petitioner will live with him in his Yonkers, New York apartment. Tina Marie Ellison, the mother of Petitioner's daughter and step-daughter, also testified on Petitioner's behalf and indicated that he has matured drastically since he has been in prison and has made every effort to better himself while incarcerated. The Respondents did not present any testimony or other evidence at the hearing.

Based on the impressive testimony we heard at the hearing, including responses to the Court's own questions posed to the Petitioner, it is our view that the best, most practical way to dispose of the Petitioner's Motions and requests for relief is to hold the issuance of the writ in abeyance pending the outcome of the Respondents' petition for writ of certiorari to the United States Supreme Court, but to release the Petitioner subject to conditions as set forth in this Order. We do not do this lightly, and are aware of the gravity of the offense that Petitioner was convicted of in the first instance.

However, we found the testimony of the SCI-Mahanoy staff to be very compelling, as well as the observations by Ms. Ellison regarding the Petitioner's maturity level. Any release under these circumstances is a leap of faith by the judge signing such order. But that leap has been made immeasurably shorter by the attendant circumstances in the case *sub judice*. In addition to the aforesaid testimony by the SCI-Mahanoy staff, we will accept Petitioner's word that he will obey the law, seek employment, and not abuse this Court's trust and authority while released. We remind Petitioner that he may well soon be on the brink of permanent freedom from incarceration, so that a slip-up now would be disastrous in terms of his ability to achieve that goal. Thus, we shall release the Petitioner subject to the conditions set forth herein below, and specifically advise him that in the event he violates any of the conditions ordered by this Court, he shall be reincarcerated forthwith.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Petitioner Lorenzo Johnson's Motion for Issuance of Writ or Bail (Doc. 91) and Emergency Motion for Order to Show Cause (Doc. 92) are **GRANTED** to the following extent:

    a. Respondents shall immediately **RELEASE** Petitioner Lorenzo Johnson from custody.

    b. Petitioner shall reside with his brother, Tyrone Johnson, in Tyrone Johnson's apartment in Yonkers, New York.

c. Petitioner shall not commit a local, state or federal crime while released.

d. In the event that the petition for writ of certiorari remains unresolved, no later than 6 months from the date hereof Petitioner's counsel shall file a status report with this Court detailing Petitioner's living arrangements, employment, and any other relevant information so as to keep us fully apprised of Petitioner's status while released.

e. Petitioner shall appear before this Court as required and must surrender himself to a prison to be designated in the event the United States Supreme Court grants the Respondents' petition for writ of certiorari and thereafter reverses the Third Circuit's October 4, 2011 mandate.

2. The issuance of a writ of habeas corpus is held in **ABEYANCE** pending the outcome of the Respondents' petition for writ of certiorari to the United States Supreme Court.

3. Counsel for the parties shall jointly file a letter report to this Court upon the outcome of respondents' petition for writ of certiorari within 48 hours of its determination by the Supreme Court.

s/ John E. Jones III
John E. Jones III
United States District Judge

OPPOSITION BRIEF

No. 11-1053

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN COLEMAN, Superintendent, State Correctional Institution at Fayette, et al.,

Petitioners,

v.

LORENZO JOHNSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

LORENZO JOHNSON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Michael Wiseman,*
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*Admitted to the Bar of this Court

Leigh Skipper
Chief Federal Defender
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Counsel for Respondent, Lorenzo Johnson

Dated: Philadelphia, PA
March 27, 2012

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COUNTER STATEMENT OF THE CASE[1]

A. Introduction

Lorenzo Johnson was convicted of first degree murder under a theory of accomplice liability. There was no dispute that his co-defendant, Corey Walker, shot and killed the decedent. On direct appeal from his conviction, Mr. Johnson argued that the evidence introduced at his trial was

---

[1]The Petition for Writ of Certiorari is cited herein as "*Petition*," followed by the relevant page number.

Petitioners, the prison officials who have custody of Mr. Johnson, and who are represented by the Pennsylvania Attorney General, are referred to as "the Commonwealth."

Respondent, Lorenzo Johnson, was the habeas petitioner below and is referred to as Mr. Johnson or Johnson.

The Commonwealth filed an *Appendix* along with its *Petition for Writ of Certiorari*. References to documents in the *Appendix* are cited herein as "A," followed by a page reference.

The parties filed a *Joint Appendix* in the Court of Appeals. Documents from the *Joint Appendix* that are not contained in the Commonwealth's *Appendix* are cited herein as "*JA*," followed by a page reference.

The decision of the Court of Appeals for the Third Circuit is found at *Johnson v. Mechling*, 446 Fed.Appx. 531, 2011 WL 4565464 (C.A.3 (Pa.)). It is referred to herein as *Panel Opinion*, and cited as *Pan.Op.*, with a full reference to the page number of the Commonwealth's *Appendix*.

The district court opinion is reported at *Johnson v. Mechling*, 541 F.Supp.2d 651 (M.D. Pa. 2008). None of the relevant state court opinions is published. Each of these opinions is contained in the Commonwealth's *Appendix* and will be cited by reference to the *Appendix* page.

All emphasis herein is supplied unless otherwise indicated.

insufficient to convict him. In affirming his convictions, the Pennsylvania Superior Court never analyzed or discussed whether the Commonwealth had introduced sufficient evidence to prove Mr. Johnson had the specific intent to kill, a necessary element of first degree murder. One judge of the three judge panel deciding his case dissented, writing that there had *not* been sufficient evidence to convict. A-12f-13f.

In its opinion granting Mr. Johnson relief, the Third Circuit reviewed Mr. Johnson's claim under 28 U.S.C. § 2254(d)(1) (AEDPA), and found that the Pennsylvania courts unreasonably applied *Jackson v. Virginia*, 443 U.S. 307 (1979), by failing to consider whether the Commonwealth established each element of the offenses charged, particularly the element of specific intent to kill.

In making this determination, the Court credited all of the Commonwealth's evidence and applied Pennsylvania evidentiary law as the Pennsylvania Superior Court would have done, had that court reasonably addressed the issue of sufficiency of the evidence related to specific intent. In contrast to other federal courts that have recently and improperly granted *Jackson* relief, the Third Circuit considered and fully credited *only* the prosecution's trial evidence.

B. Procedural History

Mr. Johnson was arrested and charged with murder in the first degree and criminal conspiracy under Dauphin County, Pennsylvania docket number 1544 CD 1996. He had a joint jury trial with his co-defendant, Corey Walker (docket number 2739 CD 1996), before the Dauphin County Court of Common Pleas on March 13, 14 and 17, 1997. Each defendant was convicted on each charge. On March 17, 1997, Mr. Johnson was sentenced to life imprisonment on the first degree murder conviction and to a concurrent term of imprisonment of five to ten years on the conspiracy count.

The Pennsylvania Superior Court affirmed. *Commonwealth v. Johnson*, 726 A.2d 1079

(Pa.Super. 1998), A-1f-11f.

Then Pennsylvania Superior Court Judge and current Judge of the United States District Court for the Eastern District of Pennsylvania, Berle Schiller, dissented from the opinion of the Pennsylvania Superior Court. Judge Schiller would have vacated Mr. Johnson's convictions because the evidence was not sufficient to sustain them:

> I dissent from that portion of the Majority's decision which upholds the conviction of Lorenzo Johnson for first degree murder and criminal conspiracy . . . I believe that there is no direct evidence, nor can any be inferred, linking defendant Johnson to the death of Taraja Williams nor any agreement with defendant Walker which resulted in Williams' death.

A-12f-13f.

Mr. Johnson's petition to the Pennsylvania Supreme Court for leave to appeal was denied. *Commonwealth v. Johnson*, 737 A.2d 741 (Pa., 1999) (Table), A-1h.

Following state post-conviction proceedings (which are not relevant to these proceedings), Mr. Johnson filed a *pro se* petition for habeas corpus relief in the United States District Court for the Middle District of Pennsylvania. *Johnson v. Mechling*, 4:04-cv-1564 (M.D. Pa).

After appointing undersigned counsel, the district court issued an order and opinion denying the petition and a certificate of appealability. *Johnson v. Mechling*, 541 F. Supp. 2d 651 (M.D. Pa. 2008), A-1e, A-1d-163d.

Mr. Johnson filed a motion pursuant to Fed.R.Civ.P. 59(e) to alter the judgment to permit a certificate of appealability. This motion was granted and Johnson was given permission to appeal the sufficiency of evidence claim. *Johnson v. Mechling*, 04-cv-1564 (M.D. Pa. May 15, 2008), *JA-50-56*.[2]

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[2]The district court's order granting a certificate of appealability is not contained in the Commonwealth's *Appendix*. It is available on PACER as document # 77.

The Court of Appeals for the Third Circuit reversed the district court and remanded the case with instructions that the Writ issue. *Johnson v. Mechling*, 446 Fed.Appx. 531, 2011 WL 4565464 (C.A.3 (Pa.)), A-1a-55a (opinion); A-1c-4c (judgment).

After the Court of Appeals issued its mandate, Mr. Johnson filed in the district court a *Motion for Issuance of the Writ or Bail*, requesting his release pending completion of these *certiorari* proceedings. Following an evidentiary hearing on January 12, 2012, at which family members and prison personnel testified on behalf of Mr. Johnson, the district court released Mr. Johnson on conditions. *Order, Johnson v. Mechling*, 04-cv-1564 (M.D. Pa. Jan. 17, 2012) (available on PACER as document # 114).[1]

C. The Trial

The state trial court's post-verdict opinion outlines the Commonwealth's trial theory. Mr. Johnson was convicted of the December 15, 1995, shotgun shooting death of Taraja Williams at the entrance to a shallow alley on the 1400 block of Market Street in Harrisburg, Pennsylvania. It was undisputed that the victim was shot by Corey Walker, who was tried jointly with Mr. Johnson. Mr. Johnson was convicted of first degree murder as Walker's accomplice. Although Mr. Johnson was also convicted of the substantive offense of criminal conspiracy, the Commonwealth did not seek to convict him of murder on a theory of conspiratorial liability. A-1g-12g.

Because the Court of Appeals decision was based on its careful examination of the trial record, crediting all of the facts introduced by the Commonwealth at trial, we set out in detail here the prosecution's entire presentation of evidence:

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[1] The district court found "impressive" and "compelling" testimony from prison staff who had known Mr. Johnson for many years, characterizing Mr. Johnson as a "model prisoner," as well as testimony from his family regarding his maturity. *Id.*

Police Officer Laura Davis responded to the scene of the shooting and found Taraja Williams' body "right between these two houses" at the entry to an alley. *JA*-101-110. The alley was "not a very wide alley . . . maybe four feet, about the stretch of my arms." *JA*-115. Although the alley went back from the sidewalk about eight to ten feet (*JA*-116), the body was found "relatively" close to the sidewalk. *JA*-118.

Leroy Lucas was employed in the Harrisburg Police Department's forensic unit. He responded to the scene and saw the body at the entrance to a "small alleyway" (*JA*-127), "towards the sidewalk." *JA*-139.

Gary Miller was the son of the owner of a bar near the shooting. A-146. He was working in the bar on the night and early morning of the shooting. He saw Corey Walker with the victim, but did not see Johnson. *JA*-148. He heard his doorman tell Walker and Williams "you all got to take that out of here" and he saw Walker and the victim leave the bar alone. *JA*-150.

Carla Brown, a self-professed crack addict who admitted to being high at the time of her observations (*JA*-169), was in Miller's bar on the night of the shooting. *JA*-157-158. She "saw" but did not hear the content of an apparent argument involving the victim, Walker, and Johnson. *JA*-158-160, 179, 181. She could not say whether Johnson was arguing on Walker's side, on Williams' side, or taking a third position with respect to the unknown subject of the argument. She acted out hand gestures on the witness stand, which the prosecutor indicated showed that there were "a lot of arm movements going on." *JA*-160. These motions were not ascribed by the witness to any particular person. She said the "argument" did not last long, when the bouncer and Miller told the men "they had to go." *JA*-160.

Brown followed the three men out of the bar because "she wanted to know what was going on." *JA*-161. Walker was "walking . . . like something could have been up under there under [his]

coat." *JA*-161. The three walked in single file, Walker in front, the victim in the middle and Mr. Johnson in the rear. *JA*-162. She did not believe that Walker and Johnson knew she was following them "because they never turned around," but she believed Williams knew she was there because he "hollered out, go ahead, suh [her nickname]." *JA*-163-164.

She saw Walker and the victim go into the alley, but Johnson "never went in." *JA*-165, 184. During the time she was walking, "nobody talk[ed] about killing anybody." *JA*-184. From the time she saw Walker and the victim enter the alley, only a couple of seconds passed, during which time she proceeded another five feet, when she heard a boom. *JA*-166-167. After the boom, she did not look back, but fled. *JA*-166-167.

Aaron Dews was employed at Youth Works, located next to the alley. On the night of the incident, he heard a loud boom, and a "minute or two later" looked out a window and saw two silhouettes "running up the driveway," *JA*-214, 216-217. Because there was plastic over the window, he could not distinguish any identifying characteristics of the people he saw running, not even their gender. *JA*-218.

Brian Ramsey, another admitted drug addict, was a Dauphin County prisoner who knew Taraja Williams, and knew that Williams was a drug dealer. *JA*-221-223. He was familiar with Walker and Johnson, whom he had "seen around" and who were often together. *JA*-224-225. He saw Williams shortly before hearing the shot. He did not know where Williams was coming from or going; "he just walked off." *JA*-229. In contrast to Brown, Ramsey said that nobody was with Williams as he came from the direction of the bar. *JA*-230. He then saw Williams "moving into one of these alleys with two other individuals," and assumed that Williams was going to conduct a drug transaction. *JA*-231. He thought one of the two people was a woman. *JA*-243. Mr. Johnson was not with Williams as Williams entered the alley. *JA*-233, 246. After seeing Williams enter the

alley, Ramsey went back to his conversation and did not see Williams again. *JA*-231. Ramsey volunteered on cross examination that "I would say he was forced in that alley" (*JA*-246); however, he neither provided any facts to support that conclusion, nor did he indicate who "forced" Williams into the alley. One of the people he saw walking with the victim was a "crippled guy" who walked with a limp, and whom he knew to be a drug dealer. *JA*-233-234. Although the prosecutor would later argue that the "crippled guy" was likely Walker, who was limping from concealing the shotgun in his coat (*JA*-450-451), Ramsey clearly distinguished the "crippled" guy – whom he had known for about a year – from Walker or Johnson. *JA*-245. He later altered his testimony to indicate that four people (three plus the victim) walked toward the alley, one of whom was a woman. *JA*-244, 249. "Not even" a minute after seeing Williams walk by from the bar, he heard a shot. *JA*-234.

Ramsey later saw Walker and Johnson milling in a crowd after the body was discovered: "They appeared like sort of maced, you know like what happened, Taraja has been killed, yeah, are you serious, you know, liquid eyed. . . ." *JA*-237.

Kevin Duffin was a Harrisburg detective. At about noon on the day following the shooting, he was driving his unmarked car when he saw three individuals in a Ford automobile at 14th and Market Streets. They sped up "in an attempt to get away from him." *JA*-257-258, 262. He put a "Kojak" light on his roof and pursued the car until it hit another car. Just before the crash, the three occupants exited the car and fled. One of them was Johnson. *JA*-263-264. Duffin did not indicate who was driving or from which door of the car Johnson emerged.

Victoria Doubs was another Dauphin County prisoner. *JA*-269-270. She was with Walker and Johnson during the day of December 14. *JA*-271. At one point, Williams showed up. *JA*-273-274. When Walker saw Williams, Walker said "let me go holler at this kid." Walker walked over to Williams and those two then walked toward Doubs. Doubs said they were "talking about the

money that Taraja owed us." *JA*-274. When Doubs said the debt was owed to "us," she did not indicate whether that included Johnson. Contrary to the Commonwealth's current assertion that the money debt was owed to Johnson, Walker, and Doubs jointly (*Petition*, 3), the prosecutor argued in closing at trial that the debt was owed only to Walker. *JA-439. See also Pan. Op.*, A-48a-49a. Moreover, the state trial court found as a fact that the debt was owed *only to Walker*, not to Walker and Johnson jointly. *Commonwealth v. Johnson*, No. 1544 CD 1996 (C.P. Dauphin, Aug. 25, 1997) *slip opinion*, A-5g.

As Williams and Walker approached Doubs and Johnson, Walker asked Williams about the money. Williams got "smart" and was "cussing out" Walker, "telling him he'd give it to him when he fel, like it and he ain't scared of him." *JA*-275. Walker "felt the need as though that he wanted to fight Taraja . . . and he fought Taraja in front of Kentucky Fried Chicken." Williams got the better of Walker and beat him with a broomstick. *JA*-275-276.

Many people observed the fight and laughed at Walker because he was beaten by a "crackhead," which made Walker angry. Walker stated that he was going to "kill that kid," at which point Doubs "laughed." *JA*-277-79.

Doubs also testified that in the early morning hours of December 15, she, Johnson and three other people were on their way to New York City. *JA*-280-281. Doubs spoke with a Detective Laudermilk on two occasions. On the first occasion, she indicated that she was in New York City with Johnson at the time of the shooting. On the second occasion, she indicated that she really did not remember if she was in New York on the night of the shooting. She was "going to be paid to tell that story and at the time I was going to be told I was going to tell that because I wanted to get out of jail and my bail was supposed to be paid." Later she stated that she was going to be paid by "one of their friends [referring to Walker and Johnson, but without distinguishing which] named

Larry. I'm not sure of his last name." *JA*-281-285.

Frederick Wentling, a State Police ballistican, testified about a part of the shotgun recovered in the alley. *JA*-298-313.

Wayne Ross, a medical examiner, testified about cause and manner of death. *JA*-341-356.

In closing argument, the prosecutor failed to identify a single fact from which Johnson's specific intent to kill could be inferred. *See e.g.*, *JA*-439-440 (Victoria Doubs); *JA*-441-442 (Gary Miller); *JA*-447-48 (Carla Brown: "she saw these two defendants in the bar with Taraja Williams," followed them out of the bar and saw Walker and Williams go into an alley, while Johnson "stands outside.") Notably, the prosecutor did not even suggest that Mr. Johnson had stood as a look-out or had in any other way facilitated the offense.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Commonwealth at Most Seeks Error Correction.

The Commonwealth offers this Court a scatter-shot list of alleged errors committed by the Court of Appeals. As set forth in detail below, the decision of the Court of Appeals is error-free. However, even if the Commonwealth's claimed errors did exist, none of them provides a "compelling reason," warranting this Court's consideration. *Supreme Court Rule 10.*

This Court's certiorari jurisdiction is "exercised sparingly, and only in cases of peculiar gravity and general importance," *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), not to correct purported error by a lower court. *See Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring) ("certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases"); Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE 255 (8th ed. 2002) (same).

At most, the Commonwealth's *Petition* amounts to a request for a highly fact-specific error correction. The Commonwealth has identified no overarching principle of law or disagreement amongst the courts of appeals that would merit this Court's intervention. Rather, the Commonwealth has manufactured five separate claims of error, suggesting in various ways that the Third Circuit has misapplied Sections 2254(d)(1) and (e)(1) of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). None of the alleged errors forms a proper basis for invoking this Court's *certiorari* jurisdiction. The Third Circuit Panel recognized and employed the appropriate provisions of AEDPA and applied the proper standards of deference to the state court decisions.

II. Each of the Alleged Errors Posited by the Commonwealth Is Based on a Misunderstanding of the Law or a Misstatement of Fact.

As the Third Circuit properly noted, a criminal conviction violates due process if the evidence at trial was insufficient to convince any rational trier of fact of the defendant's guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 313-14, 324 (1979). In conducting a *Jackson* sufficiency review, a habeas court credits as true all of the prosecution's evidence, and applies state law to determine if each element has been proven. *Id.*, at 324, n.16 ("the standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law."). The purpose of applying state law is to ensure that the federal reviewing court analyzes the evidence using the very same standards the state court would have used, had it reasonably undertaken a sufficiency review.

The Court of Appeals did exactly what it was supposed to do. It "view[ed] the evidence in a light most favorable to the prosecution," and analyzed it under applicable state law. *Id.*, at 29a. It also credited all reasonable inferences based on the facts that it assumed to be true. *Jackson*, 443 U.S. at 319 (court conducting sufficiency review must credit all "reasonable inferences"). The Court of Appeals then determined that the Pennsylvania courts had failed reasonably to apply *Jackson* to the facts that it presumed to be true because the Pennsylvania courts did not address sufficiency of the proof that Mr. Johnson had the requisite intent to kill, a necessary element of first degree murder in Pennsylvania for a principal or as an accomplice.

In Pennsylvania, an inference is "reasonable" and may be relied upon by a finder of fact if, and only if, the inference is "more likely than not to flow from the proved fact on which it is made to depend." *Commonwealth v. McFarland*, 308 A.2d 592, 594 (Pa. 1973), *quoting Turner v. United States*, 396 U.S. 398, 405 (1970). As the court subsequently explained:

Where the inference allowed is tenuously connected to the facts proved by the

> Commonwealth, due process is lacking. **Th[e] 'more-likely-than-not' test . . . must be viewed as a minimum standard in assessing the reasonableness of inferences** relied upon in establishing a prima facie case of criminal culpability. Anything less than such a standard would rise no higher than suspicion or conjecture which our law has repeatedly **rejected** as being a basis for a finding of a *prima facie* case.

Commonwealth v. Wodjak, 466 A.2d 991, 996 (Pa. 1983) (internal citations omitted); *see also Commonwealth v. Wagaman*, 627 A.2d 735, 740-741 (Pa.Super. 1993) (same); *Commonwealth v. Bailey*, 292 A.2d 345, 347 (Pa. 1972) (evidence insufficient when based on inference that "just as reasonably" has innocent explanation).

Only "inferences and conclusions that reasonably and logically can be drawn" from the proven facts may sustain a conviction. *Commonwealth v. Dooris*, 696 A.2d 152, 153 (Pa. 1997); *Wagaman*, 627 A.2d at 740, *citing Wodjak*, 466 A.2d at 996 ("[i]nference is a process of reasoning by which a fact or proposition is deduced as the logical consequence from other facts which have been established."). Thus, as the Panel noted, Pennsylvania law holds:

> If an inference is merely one of two or more possibilities of roughly equal appeal or probability, then the proposition has not been proven beyond a reasonable doubt and the verdict is the product of **speculation and conjecture**.

Pan.Op., A-33a, quoting *Commonwealth v. Gruff*, 822 A.2d 773, 788 (Pa. Super. 2003).

A. The Court of Appeals Followed *Jackson v. Virginia* When it Applied State Law in Determining Whether the Evidence Was Sufficient to Satisfy the Due Process Clause of the Fourteenth Amendment.

The Commonwealth initially claims two related errors: 1) that because the Pennsylvania "more likely than not" standard is not "clearly established federal law, as determined by" this Court, the application of this standard cannot support relief under 28 U.S.C. § 2254(d)(1) (*Petition*, 12, 13); and 2) the Court of Appeals' grant of relief is based upon a "finding that the state courts misapplied state law . . . which directly conflicts with this Court's holding that only noncompliance with federal law will render a state judgment" invalid. (*Id.*).

These contentions are baseless. As to the first contention, *Jackson* is the established precedent of this Court, which commanded the Court of Appeals to apply the state-law-generated "more likely than not" standard governing the reasonableness of inferences. The second contention is meritless for the same reason – *Jackson* requires an assessment employing state law in order to determine sufficiency.[4]

B. The Panel Properly Followed *Jackson* and Its Progeny When It Held that the Jury's Verdict Was Based on Speculation, and Not Reasonable Inferences as Defined by State Law.

The Commonwealth faults the Panel for improperly "substituting" its "subjective" views regarding the propriety of the inferences upon which the jury relied, *Petition*, 14-15, and complains that a habeas court is not permitted to choose one set of inferences over another when a state fact-finder presumably resolved conflicting inferences. *Petition*, at 15. However, the Panel neither substituted inferences nor chose one set of inferences over another. Rather – as required by *Jackson* – the Panel eliminated those inferences that were not permissible under state law because they did not more likely than not flow from the proven facts. The inferences that remained were insufficient to convict.

C. The Panel Did Not Make Any Credibility Determinations.

The Commonwealth correctly notes that under *Jackson* the reviewing court must take all of

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[4] The fact that the Panel cited two decisions of this Court applying the more likely than not standard with respect to statutory inferences, *Turner v. United States*, 396 U.S. 398 (1970) and *Leary v. United States*, 395 U.S. 6 (1973), does not help the Commonwealth. The Panel cited *Turner* because it was quoted by a Pennsylvania Supreme Court decision (*McFarland*), *Pan.Op.*, A- 34a. The Panel's citation to *Leary* was in addition to the many state court decisions it cited for the same "more likely than not" standard.

the prosecution's facts as true, and is therefore prohibited from substituting its own judgment for that of the fact-finder with respect to questions of weight and credibility. *Petition*, 18.

The Commonwealth contends that the Panel violated this precept when it did not credit the prosecution's proof in two instances. *Petition*, 15-17. These assertions are incorrect and are based on a selective and erroneous view of the record.

First, the Commonwealth cites the Panel's discussion of witness Brian Ramsey. *Petition*, 16.[5] Ramsey testified on direct examination that he did not see Mr. Johnson in the vicinity of the alley at the time of the shooting. On cross-examination, he volunteered that "I would say he [Williams] was forced in that alley." (*JA*-246). Ramsey provided no "facts" to support this conclusory statement that the victim was forced into the alley. As noted by the Panel, Ramsey did not testify that he saw the victim enter the alley, and "did not describe any physical action . . . that could lead to a reasonable inference that anyone 'forced' the victim into the alley." *Pan.Op.*, A-42a-43a.

Nevertheless, the Panel took as *true* that the victim was "forced," and still found proof of Mr. Johnson's specific intent to kill wanting because: 1) Ramsey testified that he did not see Mr. Johnson anywhere near the alley; and 2) Ramsey did not testify as to who forced the victim into the alley.

Second, the Commonwealth complains that the Panel compared ostensibly contradictory testimony from Carla Brown regarding the actions taken by Johnson at the entrance to the alley. *Petition*, 17. However, the Court's legal conclusion regarding this portion of Brown's testimony does not rest on any contradiction. Rather, the Court noted that a guilty inference would only be reasonable under the facts (including those testified to by Ramsey) if Brown had testified that

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[5]The Commonwealth cites to the *Panel Opinion* at A-22a. However, that portion of the Opinion simply recites, in a footnote, Ramsey's state post-conviction declaration.

Williams had been "shoved," "pushed, or "ordered" into the alley, or his exit otherwise blocked, and that such an action had been taken by *Johnson*. *Pan.Op.*, 39a-41a. Absent such testimony, the Court held that under the facts of this case, her testimony that "they" walked the victim into the alley, was legally insufficient.

The Commonwealth further contends that these two points are comparable to the errors of analysis this Court identified in *McDaniel v. Brown*, 130 S.Ct. 665 (2010) and *Cavazos v. Smith*, 132 S.Ct. 2 (2011). *Petition*, 18. This comparison is fanciful. In *McDaniel*, the federal habeas courts relied on evidence that **was not even presented** at trial. Indeed, the departure from *Jackson's* rule requiring that the habeas court view the trial evidence in a light most favorable to the prosecution was so dramatic that, by the time the case got before this Court, the respondent argued that it was not even a *Jackson* case:

> Although we granted certiorari to review respondent's *Jackson* claim, the parties now agree that the Court of Appeals' resolution of his claim under *Jackson* was in error . . . Indeed, respondent argues the Court of Appeals did not decide his case under *Jackson* at all . . .

McDaniel, 130 S.Ct. at 671.

Similarly, *Cavazos* does not undermine in the slightest the Panel's decision. This Court spelled out the manner in which the Ninth Circuit had misapplied *Jackson*: the Circuit "substituted its judgment for that of a California jury on the question of whether the prosecution's or the defense's expert witnesses more persuasively explained the cause of a death," *Cavazos*, 132 S.Ct. at 3, and beyond that, in so doing, got the facts **wrong**. *Id.* at 7 ("The Ninth Circuit's assertion that these [prosecution's] experts 'reached [their] conclusion because there was no evidence in the brain itself of the cause of death' **is simply false**.") Thus, the Ninth Circuit panel chose to credit the defense's expert testimony over that offered by the prosecution (a blatant violation of *Jackson* and its progeny, which requires a habeas court to **accept, not reject**, the prosecution's facts as true) and

was wrong about the facts, to boot.

These cases are a far cry from alleged errors the Commonwealth attributes to the Panel here. Indeed, the Panel carefully followed *Jackson* by crediting all of the Commonwealth's evidence as true and only then properly concluded that Mr. Johnson's conviction rested on speculation, not on evidence or the reasonable inferences that could be drawn therefrom.

D. The Panel's Application of Pennsylvania Law Regarding Accomplice Liability Was Proper.

The Commonwealth next argues that the Panel failed to apply the correct state law regarding accomplice liability. The Panel, citing Pennsylvania cases, notes that, in Pennsylvania, accomplice liability rests on a finding that the accomplice to an offense must be an "active partner." *Pan.Op.*, A-31a. The Commonwealth counters that "the least degree of concert or collusion is sufficient." *Petition*, 19-20. There is no contradiction here: the degree of collusion may be slight but it must nevertheless be active. The Commonwealth engages in word play but describes no genuine error.

E. The *Jackson* Review Conducted by the Court of Appeals Was Properly Done Pursuant to 28 U.S.C. § 2254(d)(1).

The Commonwealth appears to argue that the application of *Jackson v. Virginia* is governed only by 28 U.S.C. § 2254(e)(1), rather than by § 2254(d)(1), because it involves a review of the facts offered at trial. *Petition*, 20-21. This is incorrect.

As the Court of Appeals properly noted, under 28 U.S.C. 2254 (d)(1), *Jackson* is the "clearly established law" a state court must apply for purposes of analyzing a due process claim based on insufficiency of the evidence. Just as this Court did in *McDaniel*, the Panel applied (d)(1) to this *Jackson v. Virginia* claim, and held that the state court unreasonably applied *Jackson* under (d)(1) because the state court never considered whether the Commonwealth had introduced sufficient evidence to convince any rational trier of fact of one of the substantive elements of the offense with

which Mr. Johnson was charged - *i.e.*, whether he had the specific intent to kill.

This is the extremely rare case in which, even after applying AEDPA review and the deferential *Jackson* standard, there was simply insufficient evidence for any rational trier of fact to conclude that every element of the offense had been established. Where there is such a violation of due process, habeas corpus relief is required.

CONCLUSION

The Commonwealth has failed to show that this case presents an important issue of federal law that requires this Court's resolution or intervention. The Third Circuit accorded the deference required by AEDPA to all facets of the state court opinions The Circuit's review of Mr. Johnson's *Jackson* claim was thorough, careful, and error-free..

For these and all of the reasons stated above, this Court should not grant *certiorari*.

Respectfully Submitted,

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Dated: March 27, 2012

CERTIFICATE OF SERVICE

I, Michael Wiseman, hereby certify that on this 27th day of March, 2012, I served three copies of the foregoing Respondent's Motion for Leave to File *In Forma Pauperis* and Brief in Opposition to the Petition for Writ of *Certiorari* on the following person by United States Mail, First Class, postage prepaid:

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